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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Constitution and the Railway Labor Act permit a labor organization to collect and spend compulsory union dues and agency fees, over the objection of employees, for purposes other than the negotiation and administration of a collective bargaining agreement between that labor organization and the employer of those employees and the adjustment of grievances under that collective bargaining agreement?

2. Where a labor organization collects and spends compulsory union dues and agency fees of employees for purposes other than the negotiation and administration of a collective bargaining agreement and the adjustment of grievances between that labor organization and the employer of those employees, does a scheme which allows for the collection, expenditure, and subsequent union-determined rebate of a portion of dissenting employees' dues or fees used for purposes other than contract negotiation, contract administration and grievance adjustment satisfy the requirements of the Railway Labor Act and the first amendment to the Constitution of the United States?

3. Whether a labor organization, which owes an obligation to dissenting employees not to misspend their compulsory dues and fees for impermissible purposes, must show by clear and convincing evidence from records maintained in accordance with generally accepted accounting principles the amounts spent from those dues and fees for contract negotiation and administration and grievance adjustment?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Howard Ellis, *et al.*, and Allen L. Fails, *et al.*, ("petitioners" or "plaintiffs") respectfully pray that a writ of certiorari issue to review the judgment and orders of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A at 1a-16a), is reported at 685 F.2d 1065 (9th Cir. 1982). The opinion and order of the United States District Court for the Southern District of California granting petitioners' motion for summary judgment as to liability (App. A at 17a-26a) is reported at 78 Lab. Cas. ¶11,290 (S.D. Cal. January 21, 1976). The district court's summary judgment order was later amended (App. A at 27a-28a). The order amending the summary judgment is reported at 79 Lab.Cas. ¶11,765 (S.D. Cal. November 29, 1976).

A trial on the damages issues was held in August, 1978. The additional findings of fact and conclusions of law (App. A at 29a-32a) are reported at 88 Lab.Cas. ¶11,986 (S.D. Cal. March 14, 1980). The final judgment (App. A at 33a-35a) was entered on July 9, 1980, and is neither officially nor unofficially reported.

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[1] Pursuant to Sup.Ct.R. 21.1(k), the appended materials required for a petition for a writ of certiorari have been separately presented. Appendix A ("App. A") is comprised of the court of appeals and the district court decisions. Appendix B ("App. B") contains the verbatim recitation of constitutional and statutory provisions involved in compliance with Sup.Ct.R. 21.1(f). Appendix C ("App. C") lists pending cases in which the line between permissible and impermissible expenditures from compulsory union dues or fees is, or will be, at issue.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on September 3, 1982. On or about November 30, 1982, this Court pursuant to 28 U.S.C. § 2101(b) (1976), granted petitioners an extension of time within which to file a petition for writ of certiorari of thirty-six days, or up to and including January 7, 1983. This petition for certiorari was timely filed on January 7, 1983. Jurisdiction of this court is conferred under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are those of Section 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976), of the Railway Labor Act. The pertinent provisions of the Constitution of the United States are U.S. Const. amend. I and U.S. Const. amend. V. The pertinent portions of the text of these constitutional and statutory provisions are set forth in the Appendix B at 36a.

STATEMENT OF THE CASE

These actions were brought against the Brotherhood of Railway and Airline Clerks and various of its subordinate units (collectively referred to as "BRAC" or "union") in March, 1973 to redress violations of constitutional and statutory rights. Those violations stem from the collection and expenditure of compulsory union dues and agency fees pursuant to a collective bargaining agreement, the enforceability of which is governed by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (1976). The collection and expenditure of the compulsory union dues and agency fees were done over the written objections of certain present and former employees of Western Airlines. The action was commenced in the United States District Court for the Southern District of California. That court had

jurisdiction pursuant to 28 U.S.C. § 1337 (1976) and the Railway Labor Act.

These cases involve two sets of plaintiffs. In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, No. 73-113-N (S.D. Cal. filed March 20, 1973), the plaintiffs are or were employees of Western Airlines but were not members of BRAC. The collective bargaining agreement in effect in 1971 required that these employees tender agency fees to BRAC in an amount equivalent to the dues paid by BRAC members. The *Ellis* plaintiffs submitted written objections to BRAC protesting the collection and expenditure of their agency fees for purposes other than contract negotiation, contract administration, and grievance adjustment with Western Airlines. The *Ellis* plaintiffs sought an accounting from BRAC as to all agency fees paid.

Fails v. Brotherhood of Railway, Airline and Steamship Clerks, 73-118-N (S.D. Cal. filed March 23, 1973) is a class action. The plaintiffs and class members are all members of BRAC who were or are employed by Western Airlines. These employees submitted written objections to BRAC protesting the collection and expenditure of their union dues for purposes other than contract negotiation, contract administration, and grievance adjustment with Western Airlines. The *Fails* plaintiffs and class members also sought an accounting from BRAC as to the use of all amounts of dues paid.

In 1971, the collective bargaining agreement between Western Airlines and BRAC was modified to require all employees in the clerical craft or class to pay compulsory fees and dues to BRAC. From that date until July 30, 1980, BRAC was certified by the National Mediation Board as the exclusive representative for collective bargaining purposes of that craft or class. On July 30, 1980, BRAC was decertified as the collective bargaining representative of the clerical employees of Western Airlines.[2]

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[2] Certification of National Mediation Board, Washington, D.C. in Case No. R-4995, 7 NMB No. 218, July 30, 1980.

During the 1972-1980 period, despite the employees' protests, BRAC collected from all plaintiffs and class members one hundred per cent of the amounts it charged its voluntary members. From June 30, 1972 through 1977[1], BRAC expended compulsory funds on the following activities:

(1) Recreational, social and entertainment activities not attended by management personnel of Western Airlines;

(2) Operation of a death benefit program;

(3) Organizing and recruiting new members for BRAC among the Western Airlines bargaining unit employees;

(4) Organizing and recruiting new members for BRAC and/or seeking collective bargaining authority or recognition for employees not emloyed by Western Airlines, employees not employed in the air transportation industry, and employees not employed in other transportation industries;

(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative materials, and cartoons;

(6) Contributions to charities and individuals;

(7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such programs secured for salaried officers and employees;

(8) Conducting and attending conventions of BRAC;

(9) Conducting and attending conventions of other organizations and/or labor organizations;

(10) Defense or prosecution of litigation not having as a subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC;

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[1] The trial court did not require the union to present evidence as to its expenditures after December 31, 1977. Plaintiffs were foreclosed from further discovery in January, 1977.

(11) Support for or opposition to proposed, pending, or existing legislative measures; and

(12) Support for and opposition to proposed, pending, or existing governmental executive orders, policies, or decisions.

None of the aforementioned activities constituted contract negotiation, contract administration, or grievance settlement or adjustment in BRAC's representation of plaintiffs with Western Airlines. The district court so found in its summary judgment order (App. A at 22a), and held that protesting employees could not be required to contribute to the costs of those activities.[4] BRAC has questioned the court's paragraph 22 ruling only with regard to organizing, convention and publication expenditures, litigation costs, the death benefit program, and Grand Lodge[5] social activities.

On October 6, 1975, BRAC adopted a rebate scheme to be applied to any employee protesting the use of union dues or agency fees for purposes other than collective bargaining. The rebate scheme applies to political and ideological expenditures, legislative and lobbying costs, charitable contributions and fees for affiliation with other labor organizations. The other disbursements enumerated in paragraph 22 have never been included in the rebate program.

The Grand Lodge Board of Trustees annually computes the rebates due to any protesting employee for the prior calendar year. The rebate purportedly is equivalent to the employee's pro rata share of BRAC's disbursements for the activities covered. It has taken BRAC as long as six months after the conclusion of the year during which it has extracted and utilized the dues and fees of protesting employees for admittedly proscribed purposes to tender the rebates. BRAC has been allowed to use

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[4] Hereafter, the categories of expenditures which the district court found not to be chargeable to protesting employees will be referred to as "paragraph 22" expenditures.

[5] The Grand Lodge is the highest level of organization of BRAC, a multi-tiered international union. Beneath it are an intermediate level organization, System Board of Adjustment No. 451, and the various local lodges.

dues and fees to which it has no legitimate entitlement for as long as a year and a half before returning those monies to protesting employees. The district court and the court of appeals found that this rebate scheme satisfies the requirements of the Railway Labor Act as construed by this Court.

In October 1979, after the trial on damages, BRAC appealed to the Ninth Circuit from that portion of the district court's ruling enumerating the types of expenditures which cannot be charged to protesting Western Airlines employees. Petitioners filed a cross-appeal.

The Ninth Circuit reversed the district court decision with regard to the paragraph 22 categories challenged by BRAC. The panel affirmed the district court's ruling that the rebate scheme satisfied the requirements of the Railway Labor Act, rejecting petitioners' claim that sanctioning the collection, expenditure, and subsequent rebate would violate the first amendment. The court affirmed the district court's allocation of the burden of proof.

REASONS FOR REVIEW

I

THE MAJORITY DECISION IS IN CONFLICT WITH APPLICABLE SUPREME COURT PRECEDENT, AS IT FINDS NO VIOLATION OF PETITIONERS' CONSTITUTINAL RIGHTS, EVEN THOUGH PETITIONERS' COMPULSORY DUES WERE COLLECTED AND SPENT IN SUPPORT OF POLITICAL AND IDEOLOGICAL ACTIVITIES OF THE UNION.

In the nearly ten years this litigation has been pending, petitioners have sought unsuccessfully judicial relief for a continued denial of their constitutional rights. Earlier Supreme Court decisions skirted this issue, and limited their rulings to statutory interpretation. ***Railway Employes' Dept. v. Hanson***, 351 U.S. 225 (1956); ***International Ass'n of Machinists v. Street***, 367 U.S. 740 (1961); ***Brotherhood of Ry. Clerks v. Allen***, 373

U.S. 113 (1963). In 1977, the issue was settled by *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). This Court held that union expenditures for political and ideological activities made from dissenters' dues violated the dissenters' first amendment rights. *Id.* at 237. In so ruling, the rights of public and private employees were held to be congruent. *Id.* at 232. The finding of "state action" imposed by Section 2, Eleventh of the Railway Labor Act was expressly reaffirmed. *Id.* at 218 n. 12 (citing *Hanson, supra*).

The majority decision below misinterprets *Hanson* and repudiates *Abood*, by refusing to find any impairment of plaintiffs' constitutional rights. 685 F.2d at 1067-68. A careful analysis of *Hanson* finds no support for the view of the majority: "The [Supreme] court expressly reserved the issue of First Amendment violations as not being presented by the record." *Good v. Associated Students of the Univ. of Wash.*, 86 Wash.2d 94, 102, 542 P.2d 762, 767 (1975). Other courts have confirmed the necessary adjudication of a violation of constitutional rights in comparable cases involving both private and public sector employees. *Beck v. Communications Workers of America*, 468 F.Supp. 93, 97 (D. Md. 1979); *Ball v. City of Detroit*, 84 Mich. App. 383, 269 N.W.2d 607 (1978); *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982); *Robinson v. New Jersey*, 547 F.Supp. 1297 (D. N.J. 1982).

It is essential that the constitutional criteria be applied in these cases, as those criteria form the primary configuration of the limitations upon union expenditures of dissenters' dues. *Abood* is controlling on this point: "The Supreme Court upheld the coercion implicit in the [agency shop] statute with respect to expenditures essential to the collective bargaining process (bargaining, contract administration, and grievance adjustment), but held it to be unconstitutional with regard to other activities in which the union was engaged." *Gavett v. Alexander*, 477 F.Supp. 1035, 1048 (D.D.C. 1979). Similarly, formulation of an adequate remedy is dependent upon the application of constitutional standards to the actions engendering these litigations. The majority's

declination to find constitutional injury in the context of these cases encourages unions in all employment contexts, and in all jurisdictions, to flout the clear rule of *Abood*.

II

PROPER DELINEATION OF UNION ACTIVITIES CHARGEABLE TO DISSENTERS IS AN IMPORTANT AND UNRESOLVED ISSUE OF FEDERAL LAW. TO THE EXTENT THAT STANDARDS HAVE BEEN ARTICULATED IN SUPREME COURT PRECEDENTS, THOSE STANDARDS CONFLICT WITH THE MAJORITY DECISION.

Unresolved questions as to the limitations upon the use of compulsory union dues have plagued this Court and lower courts for decades. Notwithstanding the history of tortuous litigation, there remains no definitive determination of the extent to which dissenting employees may prohibit union use of their compulsory dues. The scope of this agonizing uncertainty is growing ever broader, as more states enact statutes authorizing some form of agency shop provision for public employees.[6]

The swelling tide of litigation involving both private and public sector employees contesting such union expenditures is afflicting federal and state courts with burdensome litigation presenting redundant involvement with complex questions. Issues as to limits upon union spending

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[6] Seventeen jurisdictions have passed such statutes: Alaska Stat. § 23.40.110(b)(2) (1972); Cal. Gov. Code § 3502.5 (West Supp. 1982); D.C. Code Ann. § 1-618.7 (1981); Hawaii Rev. Stat. § 89-4(a) (Supp. 1981); Mass. Gen. Laws. Ann. ch. 150E, § 12 (West 1982); Mich. Comp. Laws Ann. § 423:210 (1978); Minn. Stat. Ann. § 179.65, subd. 2 (West Supp. 1982); Mont. Code Ann. 39-31-401(3) (1981); N.H. Rev. Stat. Ann. § 273A:5 II(c); N.Y. Civ. Serv. Law § 208(3) (McKinney Supp. 1982-83); As construed in *Youngstown Diocesan Confederation of Secondary Teachers v. Shollenberger*, 111 L.R.R.M. 2848 (Ohio Ct. of Appeals March 24, 1981); Ore. Rev. Stat. § 243.650(10), 243.672(1)(c) (1981); R.I. Gen. Laws § 36-11-2 (Supp. 1982); Vt. Stat. Ann. tit. 21, § 1726(8) (1972); Wash. Rev. Code §§ 41.56.122(1), 41.59.100, 41.59.140(1)(c) (1982); Wisc. Stat. Ann. §§ 111.70(1)(h), (2), (3)(a)(6); 111.81(6); 111.84(1)(f) (West 1975 & Supp. 1982).

and the nature of required relief are common among these proliferating lawsuits.[7]

The articulation of clear constitutional principles in *Ellis*[8] will apply beyond the sphere of employment-related disputes. Such principles will govern the increasing number of cases involving protests over the use of compulsory university fees paid by students, and those contesting bar association expenditures from mandatory membership fees. *E.g., Good, supra; Galda v. Bloustein*, 686 F.2d 159 (3rd Cir. 1982); *Arrow v. Dow*, 544 F.Supp. 458 (D. N.M. 1982).

Ellis is the first case presenting the factors needed by this Court to answer the nagging questions raised in *Abood*. It combines a massive evidentiary record with a detailed analysis and adjudication by the trial court.[9] In turn, the court of appeals passed upon the merits of the dispute. It is appropriate for this Court to take the opportunity to review the decision of the Ninth Circuit, as the factual occurrences (employee protests and union spending) giving rise to this litigation are typical of union practices. *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746, 753 n. 6 (1963).

The trial court relied exclusively upon *Street* in holding that any expenditures from petitioners' dues for purposes other than collective bargaining, administration of the collective agreement, and grievance adjustment were prohibited. Appendix A at 24a. This holding is firmly based upon this Court's determination that: "The conclusion to which this [legislative] history clearly points is that Section 2, Eleventh contemplated compulsory unionism to force employees to share the costs of

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[7] A roster of those cases known to petitioners appears at App. C at 37a-40a.

[8] Subsequent references to "*Ellis*" refer collectively to that case and to *Fails*.

[9] Some idea of the bulk of the record can be gained from the fact that the summary judgment motion and its supporting papers (*exclusive* of prior discovery materials which had been filed with the district court) weighed in excess of 16 pounds. The trial record consists of 1,262 pages of transcript and 1,471 exhibits. Many of these exhibits are multi-page financial records.

negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 U.S. at 764 (footnote omitted). However, the majority of the Ninth Circuit panel read *Abood* as exerting minimal curtailment of union spending; *i.e.*, the only prohibitions are those upon compulsory contributions "to political candidates and to express political views unrelated to [the union's] duties as exclusive bargaining representative." 685 F.2d at 1069-70 (quoting *Abood*, 431 U.S. at 234). Following a cursory and selective quotation of language from *Allen*, *Hanson*, and *Abood*,[10] the majority opinion sets forth a test of chargeability based upon a combination of all of the nuances of those cases maximizing the union's power to collect and spend compulsory dues. That test is more expansive in terms than any postulated by BRAC's own counsel during the lengthy history of this litigation. It certainly cannot be squared with earlier decisions of this Court, as it deems expenditures from compulsory dues to be chargeable if they can meet the loose characterization of being "germane to the union's work in the realm of collective bargaining."[11] 685 F.2d at 1072.

In dissent, Judge Whelan emphatically confirmed the correctness of Judge Nielsen's ruling that the costs of each of the union activities listed in paragraph 22 of the summary judgment was non-chargeable. Reliance was placed upon this Court's characterization of institutional [*i.e.*,

[10] A noteworthy omission in the majority's analysis is the distinction between chargeable collective bargaining expenses and those for institutional purposes, which is set forth with clarity in *Schermerhorn*, 373 U.S. at 753 n. 6. As stated in the dissenting opinion of Judge Whelan [C.D. Cal., sitting by designation]: "The majority would seem to have completely ignored the language of the Supreme Court in [*Schermerhorn*] . . . [and] the suggestions implicit in such language -- to wit, that a non-union dissident employee cannot be required to contribute to pay institutional expenses of the union." 685 F.2d at 1076.

[11] Petitioners submit that the majority's test was not based upon the decisions mentioned in it; rather, as Judge Whelan suggests in the dissent, it appears to be an attempt on the part of Judge Pregerson to validate his earlier erroneous trial decisions in *Seay v. McDonnell Douglas Corp.*, No. 67-1394-HP (filed Sept. 22, 1967), *rev'd*, 427 F.2d 996 (9th Cir. 1970), *further proceedings*, 371 F.Supp. 754 (C.D. Cal. 1973), *rev'd on other grounds*, 533 F.2d 1126 (9th Cir. 1976). *See* 685 F.2d at 1076 (Whelan, J., dissenting); *see also* petition for writs of prohibition and mandamus, No. 81-1119 (U.S. filed)

non-chargeable] activities in *Schermerhorn*, and the fundamental thrust of *Abood*. Applying those authorities, Judge Whelan used a two-pronged approach. First, he found that the paragraph 22 activities "are clearly activities to which dissident non-union employees need not contribute." Second, he pruned the vague character of the Court's earlier "germane to collective bargaining" language by determining that any "germane" activities must bear a close relationship to collective bargaining functions involving petitioners' own employer, Western Airlines. 685 F.2d at 1076.[12]

If appellate court judges can purport to draw such divergent standards from the same Supreme Court sources, it can scarcely be expected that rank and file employees can understand and protect their rights in the area of compulsory funding of union activities. The confusion is to the overwhelming advantage of unions seeking to maximize their forced financial support, because those unions have the practical ability to extract payment from dissenters, upon pain of loss of employment. The acknowledged rights of the dissenters have not been respected by unions, despite the employees' most dedicated efforts to obtain judicial protection.

BRAC was a principal defendant in *Street*, and it knew unequivocally in 1961 that compulsory political contributions were forbidden. Yet not until 1975, after *Ellis* had been litigated for two and one-half years and plaintiffs had filed their motion for summary judgment, did BRAC attempt to rectify some of its chronic abuses by adopting a partial dues rebate scheme. Thereafter, BRAC continued to collect from petitioners one hundred per cent of the amounts charged its voluntary members, and to expend those funds on the full range of its institutional programs,

[12] The restrictive reading of *Abood* with regard to the definition of chargeable expenditures has been accepted by two state supreme courts. *Opinion of the Justices*, 401 A.2d 135, 147 (Me. 1977); *Association of Capitol Powerhouse Engineers v. Division of Bldg. and Grounds*, 89 Wash.2d 177, 188, 570 P.2d 1042, 1048 (1977) (*en banc*) (quoting *Abood*). Both courts limit chargeable expenditures to collective bargaining, contract administration, and grievance adjustment.

political activities, and ideological activities. A survey of similar cases pending across the country reveals an identical pattern of union intransigence and widespread impairment of employees' constitutional rights. Millions of employees are affected: those working in the private sector under the Railway Labor Act, those private sector employees governed by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1976) (except in states which have protected their citizens with Right To Work laws); and those public employees in the seventeen jurisdictions permitting agency shop requirements. A public interest of vast importance is at stake; it can only be served by Supreme Court determination of the merits of the case at bar.

Abood summarized the conundrum in cases such as *Ellis* in this fashion: "There will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." 431 U.S. at 236. The Court declined to draw those critical lines in the absence of a detailed factual record and pertinent argument from the parties. *Id.* at 236-37. For the same reasons, this Court in *Street*, 367 U.S. at 768-70, and *Allen*, 373 U.S. at 121, declined to perform this crucial task of line-drawing. With a factual record fully developed and lower court attempts to meet the challenge, a conclusive answer from this Court is long overdue.[13]

The range of union activities evaluated in *Ellis* is comprehensive; a review of the record and the opinions of the trial court and the Ninth Circuit will thus provide this Court with a favorable opportunity to provide guidance for a welter of pending and threatened cases in federal and state courts. It is most desirable that certiorari be granted in *Ellis*, as the critical decisions on the issues it presents have nationwide application.

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[13] Moreover, it is evident that the *Abood* Court saw a private sector case in a Railway Labor Act setting as the easier case in which to undertake the demanding task of line-drawing. The line to be drawn was seen as similar in the public and private sector situations, but the context of constitutional and statutory considerations was noted to be less hazy in a case such as *Ellis*. 431 U.S. at 236.

Far from serving as an instructive guide in the resolution of such disputes, the majority opinion presents a partisan approach predicated upon a mischaracterization of governing Supreme Court decisions. The Ninth Circuit majority opinion utterly fails to explicate its reasoning as to pivotal issues; for example, it nowhere attempts a definition as to what constitutes political or ideological activity. With respect to a number of functions which are clearly not collective bargaining activities, the majority finds them to be chargeable against petitioners because they are "traditional" union activities. If traditional engagement in an activity endows it with a legitimacy justifying its coerced financial support, the majority has, in effect, required protesting employees to sign blank checks payable to their unwanted union representative. No authority is cited for the self-validating effect given long-standing union programs.

The most blatant illustration of the faulty test used by the majority can be seen in its approval of compulsory payment to BRAC's death benefit plan. For years during this litigation, the *Ellis* petitioners were charged for the plan and excluded from participation in it.[14] Death benefits are not negotiated with Western Airlines, and are not mentioned in the collective bargaining agreement governing petitioners' employment.

The chargeability test used by the majority leads to comparable mischief in evaluating other paragraph 22 activities, such as conventions, publications, and organizing. Those union activities are not aimed at the representational responsibilities imposed upon BRAC as plaintiffs' exclusive representative. Those activities are institutional, and therefore non-chargeable under the Court's decision in *Schermerhorn, supra*. Each of those activities is imbued with an overwhelmingly ideological essence, and their costs are impermissible under *Street, Allen,* and *Abood*. The

[14] Query, if tradition is a meaningful criterion of chargeability, is not this exclusion from participation a relevant factor? The same practice -- compulsory payment but no participation -- existed with respect to union publications.

record below is packed with evidence demonstrating the overwhelmingly political focus of union publications and convention activities.[15]

The wide-ranging test of chargeability explicated by the majority runs against the grain of applicable principles of statutory interpretation, in addition to constitutional barriers. It is essential to determine which union activities are performed pursuant to the union's duty to provide services to dissenters. Under the statute, the union represents such persons only with respect to their own employer, and such mandatory services are confined to negotiating and administering the collective agreement, and handling grievances. The duty of fair representation, upon which unions rely as the bedrock of their argument for the extraction of compulsory dues, is no broader than a specific employment relationship. It is the maintenance of the specific employment relationship which is deemed to be the governmental interest justifying compulsory payments from dissenters. The extent of the governmental interest, not the vaulting ambitions of union leaders, governs the extent of the dissenters' financial obligation.

The unduly permissive test of chargeability drafted by the majority is irreconcilable with a proper reading of *Abood*. As one scholarly commentator described this Court's decision:

> It is clear . . . that the [*Abood*] majority did not intend to permit a union to use dissenters' fees for all activities no matter how tenuously related to the bargaining process. Such an approach would not only render meaningless the Court's distinction between collective bargaining and non-collective bargaining activities, but would also

[15] The majority's description of the content of union convention proceedings and publications, and its whimsical description of union social activities, have no basis in the record. These purported factual findings are necessarily contrary to those of the trial court, yet in no instance did BRAC even make an attempt to claim that the trial court findings were clearly erroneous.

conflict with the holding of *International Association of Machinists v. Street* that a private union's contributions to political causes are not related to its duties as bargaining representative.

> Any line separating permissible from impermissible uses of compulsory fees must be so drawn as to ensure that the union can effectively carry out its collective bargaining functions. Since the associational rights of dissenters are restricted by *any* union expenditure, such a line should also ensure that the union expend these funds only for activities that are *essential*, as opposed to merely helpful, to its duties as bargaining representative. A line which distinguishes the expenditures incident to the negotiation and administration of any specific contract from those incident to the negotiation and administration of contracts in general both serves these goals and is consistent with *Street*. Under such a test, expenses necessarily incurred in order to draft, negotiate, secure approval of, administer, or resolve disputes about any one particular contract could be financed by compulsory contributions, while expenditures incurred in order to influence the *framework* within which a particular contract is negotiated could not.

The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 196-97 (1977) (emphasis in original and footnotes omitted). An application of *Abood* consistent with this analysis was made in the Report of the Special Master in *Beck, supra*, a decision written with clarity and depth. *Beck v. Communications Workers of America*, Civ. No. M-76-839 (D. Md. August 18, 1980) (Report of Special Master).

III

THE NINTH CIRCUIT'S ACCEPTANCE OF PREPONDERANCE OF THE EVIDENCE AS THE APPROPRIATE STANDARD OF PROOF CONFLICTS WITH THE CONTROLLING DECISIONS OF THIS COURT.

The district court and the Ninth Circuit accepted the preponderance of the evidence standard as the appropriate allocation of the burden of proof. BRAC was allowed to meet this burden from records which were not maintained in accordance with generally accepted accounting principles. Before the district court, no evidence was presented as to costs incurred by BRAC to negotiate or administer a collective bargaining agreement with Western Airlines concerning the bargaining unit to which plaintiffs belong. No evidence was submitted to show the costs incurred by BRAC in adjusting grievances concerning that same bargaining unit.[16] BRAC was permitted to identify only those of its numerous expenditures which it deemed fell into paragraph 22 catagories.[17]

The Ninth Circuit's acceptance of the preponderance of the evidence standard as the proper allocation of the burden of proof is in direct conflict with the controlling decisions of this Court. In *Allen*, it was held that fundamental fairness, the linchpin of procedural due process under the fifth amendment, requires that the burden of proof be placed squarely upon the shoulders of the union. 373 U.S. at 122. *Speiser v. Randall*, 357 U.S. 513 (1958), adopted as a fifth amendment principle that where "one party has at stake an interest of transcending value . . . [the margin of

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[16] BRAC's auditor confessed that BRAC's accounting records made such a task impossible. BRAC acknowledged that unions generally do not maintain their records in accordance with generally accepted accounting principles.

[17] The result was that every dollar spent by BRAC was presumptively considered to be a Western Airlines collective bargaining expenditure unless it was excluded. This approach has been condemned judicially when utilized by an agency of the federal government, *National Cable Television Ass'n, Inc. v. Federal Communication Comm'n*, 554 F.2d 1094, 1105 (D.C. Cir. 1976), as well as in the area of union spending litigation, *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385 Mass. at 76-77 n. 3, 431 N.E.2d at 185 n. 3; *Ball v. City of Detroit*, 84 Mich.App. at 395-96, 269 N.W.2d at 612-13.

error inherent in all factfinding] is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." *Id.* at 525-26. Freedom of speech is an interest of transcending value, *id.* at 526, and is thus deserving of the more demanding standard of proof before any infringement can be condoned.[18]

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality opinion), the Court applied the clear and convincing proof standard to a libel action by a private individual against a licensed radio station for a defamatory falsehood relating to that private individual's involvement in an event of public or general concern. The more exacting standard was imposed in order to give "the First Amendment sufficient elbow room within which to function." *Id.* at 52. The clear and convincing standard was employed by the special master in *Beck v. Communications Workers of America*, Civil No. M-76-839, *slip op.* at 7 (D. Md. August 18, 1980) (Report of Special Master), a case directly on point with this case.

The Ninth Circuit found that "*Rosenbloom* has been overruled on that very point [*i.e.*, the appropriate standard of proof]." 685 F.2d at 1070 (**citing** *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). The Ninth Circuit's reading of *Gertz* is erroneous. The Court in *Gertz* endorsed the clear and convincing proof standard in cases where first amendment freedoms of speech and press might be chilled by operation of state defamation statutes. 418 U.S. at 342. The Court disagreed only with the *Rosenbloom* plurality's application of the more exacting standard to cases where, because the allegedly defamatory statement was

[18] The imposition of the more demanding standard of proof is simply a corollary to the principle that the party seeking to impinge upon first amendment rights must prove that the impingement is necessary to the effectuation of a compelling governmental interest, and that the means adopted do not lend themselves to a less restrictive alternative. In addition, BRAC admitted in the district court that it owed petitioners a fiduciary duty not to misspend their dues and fees. A fiduciary called upon to acount for property entrusted to it must establish its handling of that property by clear and convincing evidence. *Hobson v. Eaton*, 399 F.2d 781, 784 (6th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

directed to a private individual, first amendment standard were not applicable. 418 U.S. at 343-48.

The duty not to misspend funds and to justify any chargeable expenditure by clear and convincing evidence bears with it the correlative obligation to maintain records so that it can be ascertained whether or not the union has complied with its constitutional obligation. As another court has stated:

> To account is to do just that. The one obliged to account does not fulfill his duty by supplying only that which the beneficiary requests, that which is conveniently accessable, or remaining silent in the face of the beneficiary's inevitable difficulty in trying to construct or reconstruct accounts which ought to have been kept and available.

Bynum v. Baggett Transportation Co., 228 F.2d 566, 573-74 (5th Cir. 1956). For that reason, the articulation of the appropriate accounting standard is important to courts, unions, employees, and employers, whether public or private. The use of a generally accepted, systematic method will reduce the margin of error in any accounting; it will eliminate much bitter litigation, and greatly reduce the burden of judicial involvement in, and supervision of, such disputes.

IV

THE NINTH CIRCUIT'S SANCTION OF BRAC'S REBATE SCHEME DIRECTLY CONFLICTS WITH THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS AND THE DECISIONS OF SEVERAL FEDERAL DISTRICT COURTS, AND IT FAILS TO PROTECT FUNDAMENTAL FIRST AMENDMENT RIGHTS OF PROTESTING EMPLOYEES.

Numerous reasons compel the granting of this petition for a writ of certiorari with regard to the statutory and constitutional infirmity of BRAC's rebate scheme. First, the Ninth Circuit's decision directly

conflicts with the decision of the Supreme Judicial Court of Massachusetts in *School Comm. of Greenfield v. Greenfield Education Ass'n, supra*. Sup.Ct.R. 17.1(a). Second, in deciding that BRAC's rebate scheme was proper under the Railway Labor Act, the Ninth Circuit decided an important federal question which has not been but should be decided by this Court. The Ninth Circuit's decision brings into serious question the constitutionality of Section 2, Eleventh of the Railway Labor Act in that it sanctions an invasion of petitioners' first amendment rights of freedom of speech and freedom of association. Sup.Ct.R. 17.1(c).

A. This Court Has Never Sanctioned The Use Of A Rebate Scheme To Safeguard Protesting Employees' First Amendment Freedoms.

The Ninth Circuit's decision stamps with approval the rebate scheme adopted by BRAC in 1975. This scheme allows for the collection and expenditure of compulsory dues and fees for purposes and activities which BRAC recognizes as being beyond those which can be lawfully charged to protesting employees of Western Airlines. The Ninth Circuit purportedly found support for its validation of the rebate program in this Court's decisions in *Street, Allen,* and *Abood*. This Court has never endorsed the use of a rebate system as prospective protection against the improper use of fees and dues.

The Court in *Allen* endorsed the use of a refund remedy only for fees paid to the union in the past. The Court went on to suggest the use of a *dues reduction* plan for future fee exactions. 373 U.S. at 122.[19]

[19] A number of courts have concurred in this reading of the Court's endorsement of the use of rebates as being limited to retrospective relief. *Galda v. Bloustein, supra*; *Beck v. Communications Workers of America*, 468 F.Supp. at 97; *Ball v. City of Detroit*, 84 Mich.App. at 391, 396, 269 N.W.2d at 611, 613.

In *Abood*, the Michigan Court of Appeals found that the dissenting employees were entitled to no relief because the defendants had failed to indicate to the union the specific expenditures to which they objected. Subsequent to the commencement of the litigation, the union adopted an internal procedure for rebating a proportional amount of plaintiff's dues relating to union expenditures for political and ideological purposes and activities. 431 U.S. at 240 n. 41. This rebate plan was procedurally similar to BRAC's.

Because this Court found that the Michigan Court of Appeals had erred in denying the dissenters any relief, the case was remanded. This Court expressly declined to pass upon the constitutional sufficiency of the internal rebate procedure. *Id.* at 242 n. 45. The Court's concern about the constitutional sufficiency of the rebate scheme is highlighted by Justice Stevens' concurring opinion. *Id.* at 244. *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 815 (1978) (White, Brennan, and Marshall, JJ., dissenting) ("It should be obvious that the alternative means upon the adequacy of which the majority is willing to predicate a constitutional adjudication is no more able to satisfy the State's interest [in preventing the use of corporate resources in furtherance of views with which some shareholders may disagree] than a ruling in *Street* and *Abood* leaving aggrieved employees to the remedies provided by union democracy would have satisfied the demands of the First Amendment.")

Although the Court in *Abood* was concerned with the application of the first amendment to the use of compulsory agency fees under a state statute governing public employment, this Court has recognized that its interpretation of the Railway Labor Act is inextricably intertwined with considerations of freedom of speech and freedom of association. The Court has found that any "difference between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232.

B. Direct Conflict Exists Between The Ninth Circuit's Decision And Decisions Of The Supreme Court Judicial Court Of Massachusetts And Of Other State And Federal Courts.

The Ninth Circuit's endorsement of BRAC's rebate scheme directly conflicts with the Supreme Judicial Court of Massachusetts' decision in *School Comm. of Greenfield v. Greenfield Education Ass'n, supra.* In that case, the School Committee of Greenfield sought a declaratory judgment as to whether it could dismiss teachers for failing to pay an agency fee without violating the teachers' constitutional and statutory rights. The Massachusetts law in question authorized the negotiation of provisions in collective bargaining agreements requiring the payment of an agency fee by non-member public employees as a condition of employment. No agency fee requirement could be imposed, however, "unless [the employee organization] has established a procedure by which any employee so demanding may obtain a rebate. . . ." 385 Mass. at 72 n. 1, 431 N.E.2d at 182 n. 1.

It was conceded by all parties that no employee could be forced over his objection to support social, political, or speech activities of the union. Like BRAC's procedure, a portion of the agency fee assessed non-member employees was used for these impermissible purposes, but was subject to being returned under the union's rebate scheme. *Id.* at 78-79, 431 N.E.2d at 185-86. The protesting teachers maintained that the rebate procedure infringed upon their first amendment rights.

The Supreme Judicial Court of Massachusetts construed the Massacusetts statute as requiring only that protesting employees pay agency fees into an escrow account. Amounts so deposited would not be released to the union until it was determined which portion of the fee was to be used for permissible purposes. The court found that if the statute required exhaustion of the rebate procedure it would be "constitutionally suspect" under the first amendment. *Id.* at 79, 431 N.E.2d at 186. Payment of the entire agency fee to the union pending a rebate doubly damaged the protesting employees. Not only were the employees required to finance objectionable activities of the union, but they were

foreclosed from supporting expressive activities of their own. *Id.* at 83-84, 431 N.E.2d at 189.[20]

The decision of the Ninth Circuit is also in direct conflict with the decisions of lower federal and state courts. This Court has in the past considered conflicts between a federal court of appeals and lower courts in assessing the propriety of granting a petition for a writ of certiorari. *See Curtis v. Loether*, 415 U.S. 189, 191 n. 2 (1974) (conflict between the United States Court of Appeals for the Seventh Circuit and evenly divided reported decisions of the district courts with regard to the right to a trial by jury for actions under Title VIII of the Civil Rights Act of 1964).

In *Robinson v. New Jersey*, 547 F.Supp. 1297 (D. N.J. 1982), the district court granted a preliminary injunction against the enforcement of a state statute which mandated the use of a rebate scheme. Under New Jersey law, a public employee who chose not to become a union member could be charged an agency fee in an amount not to exceed eighty-five per cent of union dues. The right to charge an agency fee was statutorily authorized upon the implementation of a rebate program. *Id.* at 1300-01. The union was statutorily entitled to collect agency fees and use them for political, ideological, and lobbying activities pending return of a pro rata share of the fees paid which were used for those purposes.

In granting the preliminary injunction application, the court declared that the New Jersey statute was unconstitutional. *Id.* at 1321. The court found that the union had no legitimate interest in receiving dues for purposes other than contract negotiation, contract administration and grievance adjustment. The court was convinced that the only way the employees' constitutional rights could be protected was by requiring the union to establish in advance of payment the amount of fees needed to

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[20] This same "doubly damaged" principle was recognized by the Ninth Circuit in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970), *further proceedings*, 371 F.Supp. 754 (C.D. Cal. 1973), *rev'd*, 523 F.2d 1126 (9th Cir. 1976). This principle was ignored by the Ninth Circuit's decision in *Ellis* when it upheld the use of BRAC's rebate scheme.

reimburse the union for performing collective bargaining functions. *Id.* at 1322. In reaching its decision, the court rejected the Ninth Circuit's reading of *Abood* in *Ellis*: "In light of footnote 45 in *Abood's* majority opinion and in light of Justice Stevens' comments in his concurring opinion, it appears to me that the major premise for the Ninth Circuit's conclusion is flawed." *Id.* at 1318. The proper rule of law, which invalidates a rebate scheme of the sort adopted by BRAC, is premised upon the constitutional protections which may not be stripped from dissenting employees. The court held that the *Greenfield* decision was "a reasoned and correct application of *Abood*," and ruled that the "demand and return system" for refunding amounts to objecting employees was constitutionally insufficient. *Id.* at 1321.

Similarly, in *Beck v. Communications Workers of America, supra*, the union had adopted an internal rebate scheme. Nonetheless, the court, recognizing that allowing collection of agency fees for purposes other than collective bargaining, contract administration and grievance adjustment would seriously implicate first amendment rights of agency fee payors, ordered restitution of the amounts improperly collected by the union in the past, and enjoined future collection of agency fees in excess of the amount necessary for collective bargaining purposes. 468 F.Supp. at 97.

In *Ball v. City of Detroit, supra*, the American Federation of State, County and Municipal employees implemented a rebate procedure similar to that adopted by the teachers' union in *Abood*. 84 Mich.App. at 393, 269 N.W.2d at 612. The plaintiffs in the *Ball* case were nonmember employees who were required to pay an agency fee under Michigan state law. The court held that all agency fees already paid in excess of the amount utilized by the union for collective bargaining, contract administration, and grievance adjustment purposes had to be refunded. All future agency fees were ordered reduced by the percentage unrelated to the collective bargaining, contract administration and grievance adjustment functions, with at least annual adjustments in the fee reduction amount. The court required that the agency fees were to be

paid into an escrow account pending a judicial determination of the amount to which the union was entitled. The court felt that the dues reduction and escrow procedures were necessary in order to protect against the use of agency fees, even temporarily, for purposes which were proscribed by the first amendment. 84 Mich.App. at 396-97, 269 N.W. at 613. Political and ideological viewpoints once promulgated, and political influence once applied, cannot be withdrawn from the marketplace of ideas, the legislative chamber, or the polling booth.

The sharp divergence in the interpretations of limiting principles of constitutional law seen in the foregoing cases argues eloquently for a definitive disposition by this Court.

C. The Dubious Validity Of Rebate Programs Presents A Vital Question Concerning The Administration Of Union Security Agreements In Both Private- And Public-Sector Collective Bargaining Which Must Be Decided By The Court.

This Court requires that state and federal statutes affecting first amendment freedoms be drafted and enforced with precision to avoid all but the most compelling, narrow infringements on those fundamental rights. *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) (plurality opinion). "The loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Id.* at 373 (emphasis added). This Court recognized in *Abood* that compelled financial support of labor unions impacts upon protesting employees' first amendment freedoms. 431 U.S. at 222, 234-35. Those employees' interest in preventing even temporary infringements on their first amendment rights must be given far greater consideration than the union's interest in collecting contributions to their representational efforts. The employees' interests are at the core of constitutionally protected individual liberty. The union's interest is derived merely from a statute. *Allen*, 373 U.S. at 118, 122; *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385

Mass. at 84, 431 N.E.2d at 189; *Robinson v. New Jersey*, 547 F.Supp. at 1320.

Over twenty years ago, this Court suggested possible remedies to protect the paramount interests of employees who protest the use of their compulsory dues and fees for purposes other than contract negotiation, contract administration, and grievance adjustment. *Street*, 367 U.S. at 774-75. In *Allen*, this Court further suggested that the unions implement internal remedies to avoid "prolonged and expensive litigation . . . [which] . . . often proves unsatisfactory." 373 U.S. at 123-24. The Court also sought to avoid embroiling the judiciary in monitoring union expenditures continuously in administering relief to employees injured by union spending practices. *Id.* at 122, 124.

Today, there is still not a clear answer as to the types of prospective relief which are compatible with the first amendment. It is petitioners' position that the only prospective relief which is consistent with first amendment principles is that which requires BRAC to escrow the fees and dues charged to dissenting employees. Before any of the escrowed amounts may be released to BRAC, it must be demonstrated from records maintained in compliance with generally accepted accounting principles that the amounts sought reflect the employee's pro rata share of collective bargaining, contract administration, and grievance adjustment expenditures. The amounts sought to be released from escrow by BRAC must be subject to independent audit and court review if necessary, with BRAC at all times bearing the burden of demonstrating by clear and convincing evidence that the amounts charged are limited to the constitutionally permissible purposes.

A number of states which allow collective bargaining between public employers and public employee unions provide for the refund or escrowing of agency fee payments as a condition to allowing the execution of union security agreements compelling contributions from non-members. Hawaii Rev. Stat. § 89-4 (Supp. 1981); Mass. Gen. Laws Ann. ch. 150E, § 12 (West Supp. 1982); Minn. Stat. Ann. § 179.65(2) (West Supp. 1982)

(escrow)[21]; N.J. Stat. Ann. § 34:13A-515(c) (West Supp. 1982-83); N.Y. Civ. Serv. Law § 208(3) (McKinney Supp. 1982-83). Until this Court states emphatically that rebate programs do not protect fundamental first amendment rights of dissenters, employees who labor under union security provisions continuously interfering with their fundamental freedoms will suffer irreparable injury. Moreover, the continued uncertainty as to which types of statutory or internal union procedures satisfy constitutional requirements inhibits the adoption of meaningful administrative remedies which could reduce costly litigation and avoid time consuming judicial supervision of court-imposed remedies.

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[21] Section 179.65(2) was amended in 1976 to expressly provide for fee escrowing and a determination of the validity of any fee assessment prior to release to the public employee labor organization. Act of March 31, 1976, ch. 102, § 2, 1976 Minn. Laws 249. This particular procedure was suggested by the Supreme Court of Minnesota in *Robbinsdale Education Ass'n v. Robbinsdale Fed'n of Teachers, Local 872*, 307 Minn. 96, 109, 239 N.W.2d 437, 445, *vacated and remanded sub nom. Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872*, 429 U.S. 880 (1976). The court there found no compelling governmental interest justifying the use of union fees prior to a determination of their validity, implicitly recognizing the unwarranted infringement upon the employees' first amendment rights from allowing the interim use of those monies for impermissible purposes. *Id.* at 107-08, 239 N.W.2d at 444. The court's 1976 opinion has been reinstated. *Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872*, 316 N.W.2d 551, 552, *cert. dismissed*, ___ U.S. ___ (October 4, 1982) (No. 81-2403).

CONCLUSION

Since the *Hanson* decision in 1956, this Court has been unable to resolve definitively the troublesome issues involved in the collection and use of compulsory dues. *Ellis* at last provides a suitable record for solution of these important and difficult constitutional and statutory problems. Therefore, the Court is respectfully requested to grant certiorari in this case.

Respectfully submitted,

Michael E. Merrill

Counsel for Petitioners

82-1150

No._____

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

THE DECISIONS BELOW

Opinions and Judgment of the U.S. Court of Appeals for the Ninth Circuit

685 F.2d 1065 (1982)

Howard ELLIS, et al.,
Plaintiffs/Appellants,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Defendants/Appellees.

Allen FAILS, et al.,
Plaintiffs/Appellants,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Defendants/Appellees.

Nos. 80-5562, 80-5603.

United States Court of Appeals,
Ninth Circuit.

Argued Nov. 2, 1981.

Submitted Feb. 22, 1982.

Decided Sept. 3, 1982.

[Headnotes and attorneys' names omitted.]

[1067] Appeal from the United States District Court for the Southern District of California.

Before PREGERSON and ALARCON, Circuit Judges, and WHELAN,* District Judge.

PREGERSON, Circuit Judge:

BACKGROUND

The Railway Labor Act, as amended in 1951, permits employers engaged in interstate rail or air commerce to include in collective bargaining contracts either a union shop or an agency fee provision. Railway Labor Act, § 2, subd. 11, 45 U.S.C. § 152, subd. 11 (hereafter "Section 2, Eleventh"). A union shop provision requires employees to join the union that represents their craft or class. 45 U.S.C. § 152, subd. 11(a). An agency fee provision requires employees to pay the union a fee equal to union dues, initiation fees, and assessments, but does not require employees actually to join the union. 45 U.S.C. § 152, subd. 11(b). Such provisions prevent "free riders" from reaping the benefits of collective bargaining without contributing financial support to the union's efforts. In *Railway Employees' Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Supreme Court upheld the constitutionality of such financial support requirements, specifically rejecting contentions that a union shop provision violated the First and Fifth Amendment rights of protesting employees.

Five years later, in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court reaffirmed *Hanson*, but construed the Railway Labor Act as prohibiting the union from using any portion of an employee's mandatory dues to support political and ideological causes once the employee has informed the union of his or her objection to those expenditures. That construction allowed the Court to avoid deciding the First Amendment challenge to the use of union dues to support political activities. That issue was not faced until 1977 when, in *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977), the Court ruled that the First Amendment prohibits a union from financing political and ideological

*The Honorable Francis C. Whelan, Sr., United States District Judge, for the Central District of California, sitting by designation.

causes not germane to collective bargaining duties by using a portion of the dues of employees who object to advancing those causes.[1]

The instant action commenced in 1973, when appellants, a group of Western Airlines employees, challenged the dues payment obligation imposed by a union shop agreement.[2] The appellants contended that **[1068]** they could not be required to contribute to any union costs except those incurred for collective bargaining and grievance administration activities. They urged the district court to define the scope ofthose activities narrowly. Such a construction would entitle them to a substantial dues rebate.

In October 1975, the union (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, hereafter "BRAC") instituted a retroactive voluntary rebate program for employees who object to the use of a portion of their dues to support certain politica' or ideological causes not germane to collective bargaining. BRAC asserts that this rebate plan protects appellants' rights under *Street* and *Abood* with respect to union activities conceded by all to be "political" or "ideological."

Appellants contend that the plan still violates their First Amendment rights because it provides a rebate rather than an immediate dues reduction, thereby giving the union use of a portion of their dues for up to a full year. They also argue that the union kept inadequate records and could not account accurately for its expenditures.

Appellants next argue that they cannot be charged for certain major operating expenditures of the union. These expenditures were incurred for union activities that include: 1) Grand Lodge conventions; 2) Grand

1. *Hanson* recognized that the existence of union shop contracts raised "justiciable questions under the First and Fifth Amendments," 351 U.S. at 232-33, 76 S.Ct. at 718, but held that an employee could be required constitutionally to support the work of the union in the realm of collective bargaining. *Id.* at 235, 76 S.Ct. at 719. *Abood* prohibited the use of a protesting employee's dues to finance political causes not germane to the union's collective bargaining duties. The Court based its holding on the right of association guaranteed by the First and Fourteenth Amendments—but made no reference to any Fifth Amendment prohibition against such use of union dues. There is therefore no support for the employees' allegation in the instant case that BRAC's expenditures infringe upon their Fifth Amendment rights.

2. There were originally two separate actions, both filed in 1973. *Fails v. BRAC* was brought by employees who unwillingly joined BRAC to comply with a union shop agreement. *Ellis v. BRAC* was brought by employees hired prior to the effective date of the union shop agreement. The *Ellis* plaintiffs did not have to join the union, but were required to pay an agency fee equal to the union's initiation fee and union dues. The two actions were consolidated in early 1974.

Lodge litigation not having as its subject matter contract negotiation or administration; 3) Grand Lodge publications; 4) Grand Lodge social activities; 5) Grand Lodge death benefits; and 6) Grand Lodge organizing activities. Expenditures for these activities are not "political" or "ideological" and thus not governed by the narrow holdings of *Street* and *Abood*. Nonetheless, appellants interpret language in those and other opinions as indicating that such expenditures are not a part of the collective bargaining and grievance administration costs to which objecting employees can be required to contribute. BRAC responds that these activities are sufficiently germane to the collective bargaining process so that all employees under a union shop or agency fee arrangement should be required to shoulder their fair share of the cost of these traditional union activities.

In 1976, the district court granted appellants' summary judgment motion, holding in paragraph twenty-two of its ruling that the major operating expenditures in question (denominated "Paragraph 22" expenditures or activities) were not incurred for collective bargaining activities. The court thus ruled as a matter of law that protesting employees could not be forced to support the activities listed above through compulsory dues payments. BRAC sought 28 U.S.C. § 1292(b) certification, arguing that the district court's ruling, which covered the liability issues, extended a dissenter's entitlement to a rebate beyond the area of political and ideological expenditures. The district court issued the certification but this court declined to hear the matter until after a trial on the damages issues. (*BRAC v. Ellis*, No. 76-8143, June 7, 1976.)

The district court tried the damages claims in 1978. With respect to certain expenditures, conceded by the union to be political and ideological, the court held that the union's rebate plan fully protected plaintiffs' interests. The court then found that approximately forty per cent of the Grand Lodge's annual expenditures had been for Paragraph 22 activities, *i.e.*, the six activities listed above. The court ruled that these expenditures, as well as minimal Paragraph 22 expenditures made by the Local Lodges and intermediate System Boards, had to be refunded to protesting employees.[3]

3. The court found that the Local Lodges engaged in "almost no" Paragraph 22 expenditures; by stipulation, plaintiffs were awarded $1.00 per year from dues paid to their Local Lodge. The court likewise found that the System Boards engaged in "little" Paragraph 22 activity. Each plaintiff was awarded a rebate of approximately $4.00 for 1975 and 1976, and $1.00 per year for all other years from the date of his or her original protest.

[1069] The protesting employees appealed the decision, contending: (1) that the court erred in declining to adjudicate their First Amendment claims; 2) that the court applied the wrong standard of proof; 3) that the damages award is inadequate because the court did not require the union to account accurately for its expenditures; 4) that the court erred in cutting off plaintiffs' discovery rights six months before trial; and 5) that the court erred in refusing to consider evidence uncovered by plaintiffs after the trial but before judgment had been rendered.

The union challenged the court's summary judgment ruling that the six activities enumerated in Paragraph 22 are not germane to collective bargaining.

I. BRAC'S EXISTING POLITICAL-IDEOLOGICAL REBATE PLAN

In *BRAC v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), the Supreme Court grappled with the problem of providing a practical and adequate remedy to employees who object to a union's political and ideological expenditures. The Court stated: "The difficulties in judicially administered relief . . . should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." *Id.* at 122, 83 S.Ct. at 1163.

Pursuant to that suggestion, BRAC instituted a voluntary rebate plan in late 1975. Under the program, a protesting employee receives a rebate on his or her pro rata share of all union disbursements for political and ideological activity as well as all legislative and lobbying costs, charitable donations, and fees for affiliations with other labor organizations. The Grand Lodge computes the rebate based on information submitted by subordinate units and on reports submitted by Grand Lodge personnel concerning time and funds spent for political and ideological purposes. Any employee who believes his or her rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals.

In Findings of Fact and Conclusions of Law rendered after the trial, the district court held that BRAC's voluntary rebate plan constituted a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *Street* and *Allen*.

A. *Appellants' Constitutional Challenge to the Plan*

[1] Appellants challenge the court-approved plan, arguing that it does not protect their First Amendment right to abstain from contributing in

the first place to the union's political activities. The program fails to pass constitutional muster, they contend, because it allows the union to collect and retain the full amount of a protesting employees' dues, use part of the dues for objectionable purposes, but not pay the rebate until the following year.

This claim is meritless. In *Street*, the court avoided adjudicating a First Amendment challenge to § 2, Eleventh of the Railway Labor Act by holding that the Act itself prohibited unions from forcing employees to support political causes which they oppose. 367 U.S. at 764, 81 S.Ct. at 1797. The Court then suggested two possible remedies to protect a dissenting employee, one of which was to provide "*restitution* to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." *Id.* at 775, 81 S.Ct. at 1803. (Emphasis added.) By definition, an act of restitution entails the return of something —in this case, the rebate of a portion of the protesting employees' dues.

Abood squarely faced the constitutional issue avoided in *Street* and held that union members "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." **[1070]** 431 U.S. at 234, 97 S.Ct. at 1799. *Abood* then cited *Allen's* suggestion that a voluntary internal union remedy would be appropriate and deferred further judicial proceedings pending implementation of the plan. *Id.* at 240-42, 97 S.Ct. at 1802-03. The rebate remedy formulated to avoid statutory violations was thus approved to protect against constitutional violations as well.

The Ninth Circuit has also approved the concept of a rebate plan as an effective safeguard of employees' rights. In *Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 1131 (9th Cir. 1976), the court acknowledged that a rebate plan adopted the procedure outlined in *Allen*, and then held that the district court (Pregerson, J.) erred in granting summary judgment solely because there was a disputed question of fact whether the union would administer the rebate program in good faith. *Id.* at 1132. In the instant case, the fairness of the plan has been fully litigated.[4] The district court found that BRAC's rebate plan vindicated plaintiffs' rights. No showing has been made that this finding was clearly erroneous, and we refuse to disturb it.

4. Indeed, BRAC's program, by rebating such expenditures as charitable donations and fees for affiliations with other labor organizations, refunds more than the McDonnell Douglas/International Association of Machinists plan impliedly approved by *Seay*.

B. *The Standard of Proof Issue*

[2, 3] Appellants next assert—apparently with respect both to the rebate plan and Paragraph 22 expenditures—that the district court applied the wrong standard of proof. This claim is also without merit. Under *Allen, supra*, the union does bear the burden of proving the proportion of political to total union expenditures when employees protest the purpose of certain expenditures. 373 U.S. at 122, 83 S.Ct. at 1163. Generally in a civil case, the party with the burden of proof must persuade the trier of fact by a preponderance of the evidence. *Barr Rubber Products Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1120 (2d Cir. 1970), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115. *See also* E. Cleary, *McCormick's Handbook on the Law of Evidence* § 339 (1972). The district court applied the preponderance of evidence standard in the instant case. Appellants, however, contend that a higher standard of proof—proof by clear and convincing evidence—was required. In support of this contention they cite an unpublished opinion of the District Court of Maryland, *Beck v. C. W. A.*, M-76-839 (D.Md.1980). The *Beck* case was factually analogous to this case—it, too, was a spending protest—and the Special Master applied the clear and convincing evidence test "in view of the constitutional issues involved." However, the *Beck* Special Master did so relying solely on *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), a plurality opinion which held that a certain type of libel action had to be proved by clear and convincing evidence. That holding was extremely narrow and was not intended to extend to every case involving a constitutional claim. More importantly, *Rosenbloom* has been overruled on that very point. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). It is true that the higher burden of proof by clear and convincing evidence is appropriate in a limited range of civil actions—for example, to prove charges of fraud and undue influence, see *McCormick, supra* at § 340(b)—but it is incorrect to assert that the higher burden is required every time a "constitutional issue" is involved. The trial court properly applied the preponderance of the evidence standard.

C. *The Accounting Challenge*

[4] Appellants next assert that the district court's decision that the voluntary rebate plan protects their abstention rights was clearly erroneous because the court did not require the union to conform its books and records to generally accepted accounting principles. As a result, the objecting employees argue, BRAC was unable to satisfy its *Allen* burden of proving the proportion of political to total union expenditures.

[1071] This claim is equally without merit. Immediately after it imposed the burden of proof on unions, the *Allen* court expressly stated that "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." 373 U.S. at 122, 83 S.Ct. at 1163. In this case, the district court recognized that its Paragraph 22 ruling would be appealed and thus declined to require the union to redo its recordkeeping procedures. BRAC did produce voluminous financial records and its witnesses explained the union's accounting methods in detail.

II. APPELLANTS' CLAIM OF PROCEDURAL ERRORS

A. *Termination of Discovery*

Appellants argue that the court abused its discretion when it halted discovery six months prior to trial. The court knew, appellants assert, that they intended to move to compel further answers with respect to the deposition of the union's president. They contend that BRAC obstructed efforts to obtain information throughout the discovery process. They also contend that they were left with no way to investigate the amounts of their on-going damages. Finally, they assert that the discovery ban deprived them of access to information pertaining to two of the union's trial exhibits.

[5, 6] A district court has wide latitude in controlling discovery; its rulings will not be overturned in the absence of a clear abuse of discretion. *Canadian American Oil Co. v. Union Oil Co. of California*, 577 F.2d 468, (9th Cir. 1978), *cert. denied* 439 U.S. 912, 99 S.Ct. 283, 58 L.Ed.2d 258. Appellants have failed to show any such abuse of discretion. As BRAC points out, appellants conducted extensive discovery for five years, including a full two years following the court's summary judgment ruling on Paragraph 22 expenditures. Moreover, the discovery ban was handed down on the scheduled date of the pre-trial conference; the court's ruling was, therefore, consistent with its Local Rule 9(d), then in effect, which specified that discovery "shall be completed, if possible, prior to the pre-trial conference."

B. *Denial of Motion to Supplement the Record*

Appellants contend that the trial court abused its discretion by refusing to receive post-trial evidence of a $20.00 BRAC assessment imposed on every employee to support a national strike against a different employer, the Norfolk and Western Railway. Appellants assert this expenditure should be rebated. They brought a motion to supplement the record based on F.R.Civ.P. 59, which allows the grant of a new trial on all or part of the

issues under certain circumstances, and on F.R.Civ.P. 60(b)(2), which allows the court to set aside a judgment when there is newly discovered evidence which by due diligence could not have been discovered earlier. Appellants contend that the offered evidence would demonstrate that part of the court's prospective relief—a $1.00 per year rebate from the Local Lodges and System Board—was grossly inadequate.

[7-9] A motion to reopen to submit additional evidence is addressed to the sound discretion of the trial judge. *Berns v. Pan American World Airways, Inc.*, 667 F.2d 826, 829 (9th Cir. 1982) and cases cited therein. The denial of a motion to vacate under F.R.Civ.P. 60(b) will be reversed only upon a clear showing of abuse of discretion. *United States v. Russell*, 578 F.2d 806, 807 (9th Cir. 1978). The same is true with respect to a motion to supplement the record brought under F.R.Civ.P. 59. *Johnson V. United States*, 270 F.2d 488, 492 (9th Cir. 1959), *cert. denied*, 362 U.S. 924, 80 S.Ct. 678, 4 L.Ed.2d 743 (1960). We do not believe the district court abused its broad discretion. As the union points out, the costs of a strike are germane to collective bargaining since a strike is one of the central methods employed in collective bargaining for improving wages and working conditions. The assessment in question should not be included in any rebate; the trial court's decision was therefore correct.

[1072]

III. THE DISTRICT COURT'S PARAGRAPH 22 RULING

[10] In reviewing the district court's Paragraph 22 ruling, we are faced with a definitional problem: Are the challenged union costs political-ideological expenditures that cannot be charged to protesting employees, or are such expenditures sufficiently germane to collective bargaining, so that all employees under a union shop or agency fee agreement must contribute toward their payment? A leading labor law casebook has described this issue as "the elusive problem left unresolved by the Supreme Court of defining the kinds of 'political' expenses which cannot lawfully be taxed against an unconsenting employee." A. Cox, D. Bok, R. Gorman, *Labor Law* 1184 (1977). The district court ruled on summary judgment that, as a matter of law, protesting employees cannot be required to help defray the union's expenditures challenged by the instant case. These conclusions of law are subject to *de novo* review. *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980).

Neither the Supreme Court nor the Ninth Circuit has considered the precise issue presented here. The Supreme Court, however, has used a variety of terms to delineate the extent of the dues obligation that can properly be imposed on a dissenting employee. Appellants urge a narrow

formulation of the dues requirement based on a statement in *Street* that "§ 2, Eleventh [of the Railway Labor Act] contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 U.S. at 764, 81 S.Ct. at 1797. Without explanation, appellants contend that this statement demonstrates the Court's intent to restrict a dissenting employee's support obligation to those specific union functions.

Language in other Supreme Court decisions supports a broader concept of collective bargaining. *Allen* refers to the obligation to support "activities *germane* to collective bargaining," 373 U.S. at 122, 83 S.Ct. at 1163 (emphasis added); *Abood* cited that language with approval, 431 U.S. at 239 n.40, 97 S.Ct. at 1802 n.40. *Hanson* noted that an employee has the duty to support the "work of the union *in the realm* of collective bargaining." 351 U.S. at 235, 76 S.Ct. at 719 (emphasis added). *Hanson* also acknowledged that Congress has the power "to require . . . the beneficiaries of trade unionism to contribute to its costs," *id.*, and specifically upheld "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work." *Id.* at 238, 76 S.Ct. at 721. These words support a broader definition of the collective bargaining concept than that urged by appellants.

Abood recognized that "[t]here will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." 431 U.S. at 236, 97 S.Ct. at 1800. In *Abood*, because the issues had not been fully briefed, the court declined to determine which of the activities in question might fall outside the union's duties as exclusive bargaining representative or involve constitutionally protected rights of association. 431 U.S. at 236 n.33, 97 S.Ct. at 1800, n.33.

[11] Supreme Court decisions thus have avoided delineating the boundaries of acceptable mandatory dues provisions in collective bargaining agreements. Circuit court decisions are equally silent on the subject. Based on our reading of *Hanson, Allen,* and *Abood,* however, we believe that the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. This formulation respects and protects dissenters' rights, but does not needlessly weaken the union, whose viability is necessary to secure and maintain industrial peace.[5] Applying this test, we believe **[1073]** that the district

5. The only prior attempt by a court in this circuit to draw the line separating "political" expenditures from those related to collective bargaining was made in dictum in the

court was incorrect in holding that protesting employees cannot be charged for the union's operating expenditures at issue here. We now turn to an item-by-item analysis of the expenditures involved in this case.

A. *Grand Lodge Conventions*

[12] BRAC represents 200,000 employees throughout the country. The Grand Lodge is either in charge of or directly involved in negotiating the collective bargaining agreements pertaining to most of those employees. The quadrennial convention is an important forum for rank and file participation in determining the Grand Lodge's collective bargaining policies. For example, the major portion of a recent convention was devoted to reports, debates, and voting on contract bargaining, grievance handling, and employee wage and benefit issues. Other significant items of business included the election of national officers and decisions concerning the union's internal structure and fiscal management. Such activities guide the union's approach to collective bargaining and are directly related to its effectiveness in negotiating labor agreements.[6]

district court's decision in *Seay v. McDonnell Douglas Corp.*, 371 F.Supp. 754, 761-62 n.7 (C.D.Cal. 1973), (Pregerson, J.) *rev'd on other grounds*, 533 F.2d 1126 (9th Cir. 1976). There, the court described a range of "political" expenditures to which an objecting employee could not be required to contribute. The court based its test on the holdings of *Street* and *Allen* and on an analysis of similar provisions in the British Trade Union Act appended to the *Allen* decision. The excluded political expenditures were:

> One, for payments to or on behalf of any candidate for public office in connection with his campaign for election to such public office, or
>
> Two, for payments to or on behalf of any political party or organization, or
>
> Three, for the holding of any meeting or the printing or distribution of any literature or documents in support of any such candidate or political party or organization . . . .

Id. Any other expenditures, the court concluded, "regardless of their political nature," would be "sufficiently germane to collective bargaining to require dissenting employees who are subject to union shop or agency fee agreements to bear their share of the burden." *Id.* The *Seay* formulation thus specifically defines "political" expenditures and excludes only those items from an employee's dues-paying obligation.

This test has been quoted in a recent treatise, R. Gorman, *Labor Law* 659 (1977) and in a recent casebook, A. Cox, *et al.*, *Labor Law* 1184-85 (1977). We find it unnecessary to embrace *Seay's* test because we conclude that the union's operating expenditures in question here are not just non-political and non-ideological, but can be justified individually as germane to the work of the union in the realm of collective bargaining.

6. Furthermore, the convention achieves compliance with Section 401(a) of the Labor-Reporting and Disclosure Act, 29 U.S.C. § 481(a), which requires unions to elect officers at least once every five years by referendum or convention. Like most other national unions, BRAC elects at conventions rather than by referendum. BRAC asserts that the convention is more workable than the referendum option, which takes more time away from union business for campaigning, and ultimately can cost more. It would lead to highly anomalous results if federal legislation made conventions necessary but federal courts did not require employees to contribute to convention costs.

B. *Grand Lodge Litigation*

Paragraph 22 exempts the vast majority of the union's litigation expenditures from protesting employees' dues obligations. While the exempted cases did not pertain to any specific collective bargaining agreement or grievance, they did involve such things as: the union's challenge to the legality of the airline industry's Mutual Aid Pact, under which a struck carrier receives substantial financial assistance from non-struck carriers; the protection of employees' rights during bankruptcy proceedings involving an employer; the doctrine of fair representation; and the defense of suits alleging violation of the non-discrimination requirements of Title VII.

The aim of the Mutual Aid Pact litigation was to strengthen the union's ultimate collective bargaining weapon—the ability to engage in an effective strike, which is thwarted considerably if the struck carrier continues to receive substantial income from non-struck carriers.

[1074] In several cases, BRAC's intervention in an employer's bankruptcy proceedings protected the union members' wages and ensured continued compliance with the collective bargaining agreement while the employer underwent reorganization.

The district court's ruling would give objecting employees a free ride as to these non-political expenses, which are related to the union's work as the collective bargaining agent.

C. *Grand Lodge Publications*

The monthly magazine of the Grand Lodge is the union's primary means of communicating information concerning collective bargaining, contract administration, and employees' rights to employees represented by BRAC. Recent articles have reported the initiation and outcome of negotiations, explained contract demands, announced a strike ballot, and discussed issues involved in a potential strike. In addition, the magazine reports on significant events for individual System Boards—including the announcement of a pact with Western Airlines. The publication also has given advice concerning unemployment and health benefits, annuity rights, and insurance. While the magazine also includes general and recreational materials to make it more readable, that fact does not detract from the publication's value in the collective bargaining process. It would be extremely difficult for a union to represent employees without an effective means of communication.

D. *Grand Lodge Social Activities*

The union purchases refreshments for business meetings and occasional social activities, which are open to non-member agency fee payers as well as union members. Only miniscule amounts of money—approximately .70 of one percent of Grand Lodge expenditures—are involved. These small expenditures are important to the union's members because they bring about harmonious working relationships, promote closer ties among employees, and create a more pleasant environment for union meetings. For these reasons, we believe that these costs are germane to the work of the union in the realm of collective bargaining.

E. *Grand Lodge Death Benefits*

Death benefit plans have historically played an important role in labor organizations. Indeed, many unions originated as mutual benefit societies.

In addition, insurance benefits are a mandatory subject of collective bargaining. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). If BRAC chooses to provide death benefits itself for all employees, rather than to seek such benefits from the employer, it is then in a better position to negotiate for additional benefits or higher wages.

Moreover, the negative consequences of permitting employees to withdraw from participation in the program are potentially quite great. If low-risk employees—the younger, healthier employees with longer life spans—could opt out, the financial stability of the program would be threatened by the number of claims coming from the remaining high-risk, older employees. Thus, provision of a death benefits plan, which tends to strengthen the employees' ties to the union, is germane to the work of the union within the realm of collective bargaining.

F. *Grand Lodge Organizing Efforts*

Maximum organization of an industry benefits employees and units already organized. A union is considerably stregthened if it eliminates competition from non-union employers and a stronger union is unquestionably a more effective collective bargaining agent. Successful organizing efforts thus can strengthen the union's position at the collective bargaining table immeasurably.

CONCLUSION

As the above discussion demonstrates, each of the challenged expenditures can be seen to promote, support or maintain the union as an

effective collective bargaining **[1075]** agent and therefore such expenditures are germane to the work of the union in the realm of collective bargaining. The district court is instructed to enter judgment in favor of BRAC and to conduct any further proceedings necessary to comply with this opinion.

AFFIRMED in part; REVERSED in part; REMANDED.

WHELAN, District Judge, dissenting:

I dissent. I would affirm the trial judge in every respect.

Where I differ from the majority is that I would affirm that part of the trial court's judgment which held that the appellants were not required to contribute to the expenditures made by the Grand Lodge of defendant Union, which are listed in paragraph 22 of the Court's findings of undisputed material facts and conclusions of law decided on the motion for summary judgment, as the same was amended in the order amending summary judgment, which amending order amended paragraph 22 of such undisputed material facts. Such amendment substituted a new subparagraph 10 in place of the old subparagraph 10. The new subparagraph 10 of paragraph 22 reads:

"(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements with Western Airlines, or settlement or adjustment of grievances or disputes of employees of Western Airlines."

The majority reverses the decision of the trial court with respect to paragraph 22 just mentioned.

The activities which are listed in paragraph 22 as amended are set forth verbatim:

"22. BRAC has engaged in the following activities since June 30, 1972:

(1) Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.

(2) Operation of a death benefit program.

(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.

(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:

(a) employees not employed by Western Airlines;

(b) employees not employed in the air transportation industry;

(c) employees not employed in other transportation industries.

(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons.

(6) Contributions to charities and individuals.

(7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such programs secured for its salaried officers and employees.

(8) Conducting and attending conventions of BRAC.

(9) Conducting and attending conventions of other organizations and/or labor unions.

(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements with Western Airlines, or settlement or adjustment of grievances or disputes of employees of Western Airlines.

(11) Support for or opposition to proposed, pending, or existing legislative measures.

(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions."

The opinion of the majority seems to base its reasoning on what, to this member of the Court, is an erroneous conception of the **[1076]** law. The majority opinion relies on the language of the District Court opinion in *Seay v. McDonnell Douglas Corporation, et al.*, 371 F.Supp. 754, 761 (C.D.Cal.1973). The *Seay* case was appealed to the Ninth Circuit, and the Ninth Circuit reversed the summary judgment granted to the Union. The trial judge in his memorandum of decision granting summary judgment cited an earlier decision in the same action wherein the trial judge in such earlier decision had ruled that the only union expenditures to which non-union employees did not have to contribute were for payments to or on behalf of any candidate for public office or to or on behalf of any political party or organization or for the holding of any meeting or printing or distribution of any literature in support of any such candidate or political party or organization. The trial judge in this latter case stated, as appears in the footnote in 371 F.Supp. 754, 762, that expenditures for other purposes, regardless of their political nature, would be expenditures to which non-union employees must contribute. This member of the Court considers that such a rule would be violative of a non-union member's right to be free from association and that, in fact, such a rule is violative of the First Amendment right of appellants.

This member of the Court considers that the majority misreads what has been said or held by the Supreme Court concerning union expenditures to

which non-union employees must contribute. The Supreme Court has, of course, ruled that non-union employees are required to contribute to expenditures having to do with the negotiation, administration or enforcement of the collective bargaining agreement with Western Airlines, in this instance, as well as expenditures which are germane to collective bargaining. It is submitted that the meaning of "germane to collective bargaining" refers to the collective bargaining agreement, in this instance, the collective bargaining agreement with Western Airlines. Also, it would seem that "germane" should be considered as meaning closely related to the collective bargaining agreement with Western Airlines in this instance.

The majority would seem to have completely ignored the language of the Supreme Court in *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 754, 83 S.Ct. 1461, 1465, 10 L.Ed.2d 678 (1963). Also, the majority would seem to ignore the suggestions implicit in such language—to wit, that a non-union dissident employee cannot be required to contribute to pay institutional expenses of the union. The Supreme Court states that such institutional expenses are those things which the members authorize the union to do in their interests and on their behalf. It would seem to this member of the Court that the activities identified in paragraph 22 are such institutional activities.

Furthermore, the Supreme Court in *Abood v. Detroit Board of Education*, 431 U.S. 209, at page 236, 97 S.Ct. 1782, at page 1800, 52 L.Ed.2d 261, states that expenditures of the union in ideological activities unrelated to collective bargaining are prohibited as expenditures to which the dissident non-union employee must contribute. It is submitted that the activities set forth in paragraph 22 are clearly activities to which dissident non-union employees need not contribute.

Findings of Undisputed Facts and Conclusions of Law of the U.S. District Court for the Southern District of California, Entered January 21, 1976

78 Lab. Cas. par. 11,290

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	Civil No. 73-113-N Consolidated with Civil No. 73-118-N FINDINGS OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW
ALLAN FAILS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	

This cause came on regularly for hearing and consideration before the Honorable Leland C. Nielsen on the motion of the plaintiffs, Howard Ellis, et al., Allan Fails, et al., individually and as class representatives, for summary judgment in the above entitled and consolidated cases, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court, having considered said motion and the opposition of defendants thereto, and having examined and considered the entire record in the matter, including the pleadings, depositions, affidavits, and [2] memoranda filed in support of and in opposition to the said motion, the Court now finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiffs at the commencement of these actions were citizens of the United States, residing in the State of California and employed by Western Airlines at various locations in the State of California, including Los Angeles, San Francisco and San Diego.

2. Defendants Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and its subsidiary organizations, System Board of Adjustment No. 451, Skyliner Lodge Local 3001, Sky Harbor Lodge Local 3014, and Arrowliner Lodge Local 3049, are unincorporated associations and labor organizations whose purpose, in part, is the representation of employees for collective bargaining over wages, hours and working conditions within the meaning of Section Two of the Railway Labor Act. Defendant California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees is an unincorporated association, subsidiary to and affiliated with the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, which has as its purpose, in part, the sponsorship of legislation in the State of California. Defendants are hereinafter collectively referred to as "BRAC".

3. Defendants Local Lodges 3001, 3014 and 3049 are subsidiary to Defendant System Board No. 451, which is in turn subsidiary to the Grand Lodge of the Brotherhood of Railway, Airline and Steamship Clerks.

4. Western Airlines is a corporation authorized to and doing business in the State of California, engaged in [3] the transportation of passengers and freight in interstate commerce.

5. At all times material, Western Airlines has maintained a collective bargaining relationship with BRAC governing the terms and conditions of employment of plaintiffs and Fails class members and BRAC has been, and is, the exclusive bargaining agent for the craft or class of employees in which they are employed.

6. Under the terms of the collective bargaining agreement in effect between Western Airlines and BRAC, effective October 1, 1969, and the Letters of Agreement of October 27, 1966 and February 26, 1971, made a part of and incorporated into the collective bargaining agreement, each employee in a classification under the agreement was required to acquire and maintain membership in BRAC as a condition of employment after completion of the sixtieth day of employment, except that employees who were hired prior to October 27, 1966 and were not members as of that date were not required to acquire and maintain membership but only to tender

to BRAC an agency fee equal to the initiation fee and monthly dues uniformly imposed on union members.

7. A communication issued by BRAC International President C. L. Dennis and published in the November, 1975 issue of the *Railway Clerk/ interchange* construed the BRAC Constitution as not requiring any employe represented by BRAC to become a formal union member as a condition for retaining his job rights or for qualifying for other generally available union benefits.

8. Plaintiffs Fails, Frost, Johnson, Erkman, Taylor, Brown, Nelson, Damante, Ryan, Grote, Ballard, Young, Douglas, Emminger and Wisor, hereinafter collectively referred to as the "Fails plaintiffs" are or have been members of defendant **[4]** BRAC, employed by Western Airlines. On March 23, 1973, the Fails plaintiffs filed Case No. 73-118-N, for themselves and as class representatives.

9. The Fails plaintiffs' motion for determination of class action determination of all issues was granted in orders entered by this Court dated September 14, 1973 and April 8, 1975. The class includes all BRAC members employed or formerly employed by Western Airlines who submitted written objections as stated in paragraph 13 of the Fails complaint. Subsequent references to the "Fails plaintiffs" include the the class members.

10. Plaintiffs Ellis, Balian, Sauls, Dean, Payne, Fontaine, and Loudin, hereinafter collectively referred to as the "Ellis plaintiffs," are or have been employees of Western Airlines who have declined to become members of defendant BRAC, but who have been obligated, as a condition of their employment, to tender agency fees to defendant BRAC equivalent to the membership dues and fees paid by members of defendant BRAC. On March 20, 1973, the Ellis plaintiffs filed Case No. 73-113-N.

11. Subsequent references to "the plaintiffs" include the Ellis plaintiffs, the Fails plaintiffs, and the Fails class members.

12. Except for the class allegations in Case No. 73-118-N, the allegations of the two complaints are essentially the same. The plaintiffs alleged that defendant BRAC expended compulsory dues and fees exacted from plaintiffs, over their written objections, for political and various other non-collective bargaining purposes. Plaintiffs alleged that these expenditures over their objections deprived them of their rights under the Railway Labor Act and the First, Fifth and Ninth Amendments to the United States Constitution, and constituted a breach by defendant BRAC of its duty of fair **[5]** representation owed to plaintiffs. Plaintiffs further alleged that defendant BRAC's existing three and one-third cents dues

reduction procedure was unavailable to plaintiffs and further that the procedure was arbitrary and discriminatory because it did not correlate with defendants' political and ideological expenditures. Plaintiffs sought declaratory and injunctive relief, money damages, attorneys' fees, and costs.

13. Plaintiffs and those class members falling within the territorial jurisdiction of the Defendant Local Lodges 3001, 3014 and 3049 pay dues and fees to the appropriate Local Lodge, to System Board No. 451, and to the Grand Lodge. Each Local Lodge remits 30 cents per person per month to the California State Legislative Committee. The remaining class members pay dues and fees to Local Lodges in their area, to System Board No. 451, and to the Grand Lodge. Thirty cents per month from their dues and fees is similarly sent to a State Legislative Committee.

14. Each plaintiff and class member has sent a written protest to BRAC, objecting to the contractual requirement compelling the payment of wages as union dues and fees. The language of each such protest is as follows:

> As an employee of Western Airlines, I feel that the Brotherhood of Railway, Airline and Steamship Clerks does not properly represent my interests and I protest the compulsory "agency fee" I must pay the Brotherhood of Railway, Airline and Steamship Clerks, in order to retain my job. In addition, I hereby protest the use of these fees for any purpose other than the cost of collective gargaining [*sic*] and specifically protest the support of Legislative goals, candidates for political office, political efforts of any kind or nature, ideological causes, and any other activity **[6]** which is not a direct cost of collective gargaining [*sic*] on my behalf. I demand an accounting and refund from the Brotherhood of Railway, Airline and Steamship Clerks of all fees exacted from me by the so-called "agency fee".

15. Each such protest was sent by certified mail. In some instances, delivery was refused; in others, the letters were discarded; in still others, the letters were received but not opened. Defendants did not respond to any of these protest letters.

16. When the protest letters were sent by plaintiffs, the BRAC Constitution contained the following refund device:

> **Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third (3-1/3) cents per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues become effective with the month following the month in which the**

member notifies the Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

17. None of the plaintiffs' dues were reduced or refunded in the amount set forth in the BRAC Constitution. Plaintiff Ellis specifically requested the 3-1/3 cents per month reduction, but was told that non-members could not participate in the reduction scheme.

18. Approximately nine months after these suits were commenced, BRAC promulgated a Policy Statement (dated January 24, 1974) which established a procedure whereby objecting members and agency fee payers could secure a refund of that portion of their dues and fees which was expended upon **[7]** "political purposes not germane to collective bargaining." Plaintiffs thereupon sought and obtained leave to amend their complaints.

19. The amendments allege that provisions of the Policy Statement are inconsistent with those of the BRAC Constitution, and that the Policy Statement is consequently invalid, as it was not adopted as a constitutional amendment. It is charged that the Policy Statement is part of a continuing bad faith effort by BRAC to deprive plaintiffs of constitutional and statutory rights. In addition to the relief requested in the complaints, plaintiffs pray:

(1) for an order determining that the adoption of the Policy Statement is void;

(2) for an order restraining defendants from subjecting persons represented by BRAC to the Policy Statement;

(3) for an order releasing objectors from any obligation to pay dues, fees, or assessments to defendants or any subordinate or affiliated organizations as a condition of employment;

(4) for damages, attorneys' fees, costs, and such other relief as the Court may deem proper.

20. Defendants raise the following affirmative defenses to the complaints, as amended:

(1) failure to state a claim upon which relief may be granted;

(2) failure to exhaust internal and administrative remedies;

(3) the bar of various statutes of limitations;

[8] **(4) preemption by the System Board of Adjustment, with regard to those claims arising out of the interpretation or application of the collective bargaining agreement.**

21. Case No. 73-113-N and Case No. 73-118-N, pursuant to the stipulation of the parties and the order of this Court, have been consolidated for purposes of discovery and trial.

22. BRAC has engaged in the following activities since June 30, 1972:

(1) Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.

(2) Operation of a death benefit program.

(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.

(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:

(a) employees not employed by Western Airlines;

(b) employees not employed in the air transportation industry;

(c) employees not employed in other transportation industries.

(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons.

(6) Contributions to charities and individuals.

[9] (7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such programs secured for its salaried officers and employees.

(8) Conducting and attending conventions of BRAC.

(9) Conducting and attending conventions of other organizations and/or labor unions.

(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC.

(11) Support for or opposition to proposed, pending, or existing legislative measures.

(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions.

23. Funds for the activities listed in paragraph 23 are derived in part from the dues and fees plaintiffs are compelled to pay BRAC.

24. A portion of plaintiffs' payments to the Grand Lodge are placed in general fund accounts. The defendants have been affiliated with various

non-BRAC organizations at times material hereto, and have contributed amounts from general funds to said organizations. Included among those organizations are:

> the AFL-CIO, the Canadian Labour Congress, the Congress of Railway Unions, the Council of AFL-CIO Unions for Professional Employees, **[10]** the Union Label and Service Trade Department of the AFL-CIO, and Canadian Railway Office of Arbitration, the Canadian Railway Labour Association, the Cooperating Railway Labor Organizations, the Canadian Non-Operating Railway Unions, and the San Diego-Imperial Counties Labor Council.

The foregoing non-BRAC organizations engage in fraternal, social, and political activities; and they espouse positions on economic and ideological issues, through publications and other means.

25. The Railway Clerks Political League (RCPL) is an unincorporated association affiliated with BRAC. Its officers are all BRAC officers, and its activities are conducted by officers and employees of BRAC, whose compensation is paid entirely by BRAC. Office space, computer services, and other operating supplies and facilities are provided by BRAC at no charge. The funds for such undertakings are derived from the BRAC General Fund, into which a portion of plaintiffs' dues and fees is commingled.

26. The RCPL supports or opposes political candidates, causes and legislation.

27. Funds for the RCPL are solicited by paid officers and employees of the Grand Lodge of BRAC and its subordinate and affiliated organizations, including the remaining defendants. These fund-raising activities include publications in the BRAC magazine, *Railway Clerk/interchange*, and personal appeals at System Board and local lodge meetings. The direct and indirect costs of such fund-raising activities are paid by BRAC from general funds, and RCPL makes no reimbursement therefor.

[11] 28. Some amounts collected for RCPL are transmitted through the General Fund accounts of the Defendant Local Lodges, System Board #451, and Grand Lodge. RCPL funds have been utilized for the payment of employee salaries and other BRAC Grand Lodge operating expenses since prior to January 1, 1972.

29. BRAC has incurred costs for political activities from its General Fund for at least five to ten years.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties hereto, and over the subject matter hereof, under 28 U.S.C. § 1337.

2. Fails et al. v. BRAC, Case No. 73-118-N, is properly brought as a class action.

3. BRAC owes each plaintiff the fiduciary duty of fair representation.

4. Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152 *et seq.*, as construed by the United States Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784 (1961), is intended to force all employes covered by the Act to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.

5. The Railway Labor Act prohibits the use of fees and dues for non-collective bargaining purposes and activities, over protest from a represented employe.

6. Those activities listed in Paragraph 22 of the Findings of Fact are non-collective bargaining activities as that term is defined in *Street, supra.*

7. BRAC's use of dues and fees of protesting employes for non-collective bargaining activities and purposes **[12]** constitutes a breach of the fiduciary duty of fair representation BRAC owes to each plaintiff.

8. BRAC has further breached its duty of fair representation of plaintiffs by the following:

(1) refusing delivery of some of plaintiffs' protest letters, discarding some letters, and ignoring the balance of such letters;

(2) failing to make dues reductions of 3-1/3 cents per month to Fails plaintiffs and class members, as provided in the BRAC Constitution;

(3) excluding agency payers such as plaintiff Ellis from eligibility for the 3-1/3 cents dues reduction because of their non-membership;

(4) maintaining provisions in its constitutions (1967 and 1971) which were not good faith efforts to comply with its lawful obligations.

Dated: January 20, 1976.

/s/ Leland C. Nielsen
LELAND C. NIELSEN,
United States District Judge

Interlocutory Summary Judgment of the U.S. District Court for the Southern District of California, Entered January 21, 1976

78 Lab. Cas. par. 11,290

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants.

Civil No. 73-113-N
Consolidated with
Civil No. 73-118-N

INTERLOCUTORY SUMMARY JUDGMENT

ALLAN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants.

In accordance with the Findings of Fact and Conclusions of Law in this matter and with Rule 56(c) of the Federal Rules of Civil Procedure, and the Court having determined that there are no genuine issues of material fact as to the issue of liability alone,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That an interlocutory summary judgment be entered for the plaintiffs and Fails class members (hereinafter [2] collectively referred to as

"plaintiffs") as to the issue of liability alone, the Court having found defendants to have breached their duty of fair representation as more fully set forth in the Findings of Fact and Conclusions of Law;

2. That summary judgment be denied as to each and every issue of damages, all such issues to be determined according to evidence to be presented at the trial phase of this litigation; and

3. That the pretrial conference for this litigation be held on May 3, 1976; all parties to conform to the dictates of Rule 9 of the Local Rules of Civil Procedure, Southern District of California.

SO ORDERED.

Dated: January 20, 1976.

/s/ Leland C. Nielsen
LELAND C. NIELSEN,
United States District Judge

Order Amending Interlocutory Summary Judgment of the U.S. District Court for the Southern District of California, Entered November 29, 1976

79 Lab. Cas. par. 11,765

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N
ALLEN FAILS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	ORDER AMENDING INTERLOCUTORY SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION TO RELIEVE DEFENDANTS OF THE REQUIREMENT OF FURTHER ANSWER TO INTERROGATORY NUMBER FIVE

The Court entered an interlocutory summary judgment for plaintiffs dated January 21, 1976. In conjunction with that summary judgment, the Court stated among its findings of fact that:

> 22. BRAC has engaged in the following activities since June 30, 1972:
>
> * * *
>
> (10) Defense or prosecution of litigation not having as its subject matter the negotiation [2] or administration of collective

bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC."

Subsequent to the rendition of the summary judgment, plaintiffs propounded a fifth series of interrogatories, of which Interogatory No. 5 sought to ascertain the expenditures of all organizations affiliated with BRAC for activities listed in Paragraph 22 of the Court's findings of fact. Defendants prepared and served a partial response, and on November 4, 1976, filed a motion to obtain relief from submitting further answers to that interrogatory.

Upon consideration of defendants' motion, the response filed by plaintiffs, the presentation of oral argument and related research, *the Court deems it appropriate*:

(a) *to clarify its earlier ruling so as to delimit the scope of costs chargeable against plaintiffs to those of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes incurred by the defendants in the representation of plaintiffs with Western Airlines*; and

(b) to relieve defendants of the requirement of further answer to Interrogatory Number 5.

IT IS THEREFORE ORDERED AND ADJUDGED that Paragraph 22 (10) of the Court's findings of fact issued in conjunction with the summary judgment dated January 21, 1976, be withdrawn, and the findings of fact, conclusions of law, and interlocutory summary judgment are hereby amended by substitution of the following finding of fact:

"22. BRAC has engaged in the following activities since June 30, 1972:

* * *

[3] (10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements with Western Airlines, or settlement or adjustment of grievances or disputes of employees of Western Airlines."

AND IT IS FURTHER ORDERED AND ADJUDGED that defendants are relieved of the requirement of further answer to Interrogatory Number 5 in plaintiffs' fifth series of interrogatories.

DONE AND ORDERED THIS 29 day of November, 1976.

/s/ **Leland C. Nielsen**
LELAND C. NIELSEN, JUDGE

Findings of Fact and Conclusions of Law of the U.S. District Court for the Southern District of California, Entered March 14, 1980

88 Lab. Cas. par. 11,986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,

Defendants.

Civil No. 73-113-N

Consolidated with

Civil No. 73-118-N

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ALLEN FAILS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,

Defendants.

These consolidated actions came on for further trial on August 1, 1978, before the Honorable Leland C. Nielsen, U. S. District Judge, sitting without a jury. The plaintiffs were represented by Michael E. Merrill, Esq., Raymond L. [*sic*] LaJeunesse, Jr., Esq., and Hugh L. Reilly, Esq. The defendants were represented by Joseph L. Rauh, Jr., Esq., John Silard, Esq., Mary M. Levy, Esq., and Solomon I. Hirsh, Esq. The Court having heard **[2]** and considered the evidence, both oral and documentary, the

arguments of counsel, both oral and written, and now being fully advised, makes the following Findings of Fact and Conclusions of Law:

1. On January 21, 1976 this Court issued Findings of Fact, Conclusions of Law and an Interlocutory Summary Judgment on the liability issues, which judgment together with amendments of April 14, 1976, and November 29, 1976, are incorporated herein as if set forth at length.

2. On April 14, 1976, the Court certified its Interlocutory Summary Judgment for appeal, but the Court of Appeals denied hearing on said certification June 7, 1976.

3. The Findings of Fact and Conclusions of Law and the Interlocutory Summary Judgment were the framework for the trial commencing on August 1, 1978, as the pretrial order provided that these findings and conclusions "are conclusive and shall not be subject to challenge or supplementation by evidence or legal argument at the trial."

4. On October 6, 1975, BRAC adopted a rebate plan encompassing all political and legislative expenditures of the Grand Lodge and subordinate units, as well as all ideological expenditures and all dues and contributions to other labor federations, organizations and charities. That plan is a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963). The Grand Lodge Board of Trustees annually computes political-ideological rebates due to any protesting dues payer for the prior calendar year. These are computed on the basis of forms submitted by subordinate units and upon reports of political **[3]** time and expenditures by Grand Lodge personnel which are contemporaneously logged on the Grand Lodge computer system throughout the calendar year. Any employee who believes his rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals. Members of the Board include former Governor Edmund G. Brown, Dame Soia Mentschikoff and Reverend Preston Bradley.

The Board of Trustees' computation for calendar year 1975 disclosed that 4.68% of the Union's total income from dues and fees had been expended for items included in the rebate plan, and each plaintiff in this suit was sent a refund check for that proportion of his 1975 dues payment, as well as for each earlier year back to the date of his initial dues protest. The rebate computation for 1976 was 4.9%, and each plaintiff was then sent that amount for 1976 plus the amount necessary to increase to 4.9% the rebate for each prior year since his protest. Plaintiffs have also been

sent their rebates for 1977, amounting to 5.4% of their dues payments in that year. No plaintiff has appealed to the Public Review Board, although each has been advised of his right of appeal.

5. On the basis of the above finding, the Court concludes that plaintiffs' rights in the political-ideological area have been vindicated by the rebates they have received and are protected for the future by the rebate plan.

6. With respect to the area of expenditure defined in Paragraph 22 of the Interlocutory Summary Judgment, pre-1976 based upon defendants' stipulation, each plaintiff is awarded with interest his entire dues payment made or transmitted to the Grand Lodge from the date of his initial protest through December 31, 1975.

[4] 7. For calendar year 1976 each plaintiff is awarded with interest a return of 40.0% of his dues paid to the Grand Lodge.

8. For calendar year 1977 each plaintiff is awarded with interest 37.8% of his dues paid to the Grand Lodge in 1977.

9. These awards for 1976 and 1977 are based upon trial exhibits B and C and the supplements thereto, which the Court finds to have been supported by a preponderance of the evidence.

10. To comply with the requirements of the Railway Labor Act, defendants shall establish a system that reduces the dues payment obligation to the Grand Lodge of any plaintiff for each calendar year by the proportion of Grand Lodge expenditures determined by defendants to have been spent for Paragraph 22 functions and the rebates in the political-ideological areas in the preceding calendar year. To determine the annual reduction amount, defendants shall at once integrate Paragraph 22 data into the regular accounting records of the Grand Lodge which are subject to independent annual audit, and as concerns compensated time of officers and staff, such records shall be kept on the basis of a time study or other investigation establishing generally accepted accounting standards for allocating the compensated time and expenses of Grand Lodge personnel who engage in Paragraph 22 activity.

11. The testimony of the Local Lodge defendants and examinations of their books and records established by a preponderance of the evidence that the Locals engage in almost no Paragraph 22 activity and incur only minimal expenditures in Paragraph 22 areas other than political contributions and expenses which are already a part of the rebate plan. Upon the stipulation of the defendants, each plaintiff is awarded **[5]** a return of $1.00 per year from dues paid to his Local Lodge from the date of his original protest through 1977 and in each calendar year thereafter.

12. Testimony by officers and employees of defendant System Board and examination of the books, records and other exhibits establish by a preponderance of the evidence that, with the exception of the years 1975 and 1976, the System Board engages in little Paragraph 22 activity. Only minimal sums are spent on such activity, except items already rebated to the plaintiffs. Therefore, each plaintiff is awarded the sum of $4.14 per year from the System Board for the year 1975 and a similar amount for 1976, and upon stipulation of the defendant, each plaintiff is awarded a return of $1.00 per year from the date of his original protest through 1977 and each calendar year thereafter, except for 1975 and 1976.

13. The costs of defending this litigation are not a Paragraph 22 expenditure.

14. Plaintiffs are entitled to no return for any alleged waste on the part of defendants.

15. Upon stipulation of the defendants, strike benefits shall be paid to agency fee payers equally with regular members with no requirement being imposed upon such persons or any other plaintiff other than that of refraining from working for Western Airlines during the time for which said benefits are paid.

16. The plaintiffs shall recover the share of their dues allocable to the death benefit fund and will no longer be required to pay same, but shall be deemed to have waived any rights or benefits under that fund.

17. The plaintiffs are entitled to their costs of suit.

Dated: March 14, 1980.

/s/ Leland C. Nielsen
LELAND C. NIELSEN,
United States District Judge

Judgment of the U.S. District Court for the Southern District of California, Entered July 9, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	Civil No. 73-113-N Consolidated with Civil No. 73-118-N JUDGMENT
ALLEN FAILS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	

In accordance with the Findings of Fact and Conclusions of Law entered by this Court on March 14, 1980,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Each plaintiff is awarded the sum next to said plaintiff's name in Attachment A hereto for expenditures made by defendants on the activities set forth in Paragraph 22 [2] of the Interlocutory Summary Judgment (other than expenditures which are already a part of the political-ideological rebate plan adopted on October 6, 1975) for the period from the date of initial protest through December 31, 1977.

2. For the period from January 1, 1978, to date of Judgment, each plaintiff is awarded, with interest, a sum equal to said plaintiff's share of the expenditures made by defendants on Paragraph 22 activities (other than expenditures which are already a part of the political-ideological rebate plan adopted on October 6, 1975).

3. Defendants are directed to establish a system that reduces the dues payment obligation of any plaintiff for each calendar year by $2.00 per year plus the proportion of Grand Lodge expenditures determined by defendants to have been spent for Paragraph 22 functions and the rebates in the political-ideological areas in the preceding calendar year and to determine the annual reduction amount for the Grand Lodge in accordance with the provisions of Paragraph 10 of the Findings of Fact and Conclusions of Law of March 14, 1980.

4. As stipulated by defendants, strike benefits shall be paid to agency fee payers equally with the regular members with no requirement being imposed upon such persons or any other plaintiff other than that of refraining from working for Western Airlines during the time for which said benefits are paid.

5. Since each plaintiff is awarded a recovery of the share of their dues allocable to the death benefit fund under Paragraphs 1 and 2 hereof and will no longer be required to pay same under Paragraph 3 hereof, plaintiffs shall be deemed to have waived any rights or benefits under that fund.

6. Plaintiffs are entitled to their costs of suit.

7. Defendants have repeatedly made clear their [3] intention to appeal this Court's ruling in the Interlocutory Summary Judgment that all expenditures made by defendants on Paragraph 22 activities fall outside the area of collective bargaining and this Court having determined that this is a controlling and important question of law not yet settled by the appellate courts, this Judgment is stayed until final appellate review herein upon the

condition that defendants present to this Court, within 10 days, and this Court approves, an appropriate supersedeas bond.

7-7-80

/s/ Leland C. Nielsen
LELAND C. NIELSEN
UNITED STATES DISTRICT JUDGE

Approved as to form:

Michael E. Merrill
Attorney for Plaintiffs

/s/ Joseph L. Rauh, Jr.
Joseph L. Rauh, Jr.
Attorney for Defendants

[Attachment A to Judgment omitted.]

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Railway Labor Act § 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976):

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

APPENDIX C

LIST OF PENDING CASES IN WHICH THE LINE BETWEEN PERMISSIBLE AND IMPERMISSIBLE EXPENDITURES FROM COMPULSORY UNION DUES OR FEES IS, OR WILL BE, AT ISSUE

California:

Bianchini v. California School Employees Association, No. SF-CO-157 (Cal. Pub. Empl. Rel. Bd. filed Sept. 29, 1981) (2 consolidated cases).

Cumero v. King City High School District Association, 962 Gov't Empl. Rel. Rep. (BNA) 15 (Cal. Pub. Empl. Rel. Bd., Mar. 3, 1982), *appeal docketed*, 1 Civ. No. AO16723 (Cal. Ct. App., 1st Dist., Apr. 1, 1982).

Link v. Antioch Unified School District, No. SF-CE-494 (Cal. Pub. Empl. Rel. Bd. filed Sept. 24, 1980) (4 consolidated cases).

Mills v. Chico Unified Teachers Association, No. S-CO-47 (Cal. Pub. Empl. Rel. Bd. filed Jan. 24, 1980).

Hawaii:

Jensen v. Yonamine, 437 F.Supp. 368 (D. Hawaii 1977) (order abstaining pending state court determination), *state court proceedings sub nom. Aio v. Hamada*, No. SF-05-42 (Hawaii Pub. Empl. Rel. Bd. Jun. 13, 1980), *aff'd*, No. 62067 (Hawaii 1st Cir. Ct. Dec. 22, 1981), *appeal docketed*, No. 8663 (Hawaii Jan. 21, 1982).

Maine:

Associated Faculties v. Alberni, No. 80-995 (Portland, Me., Super. Ct. filed July 21, 1980) (and 52 similar cases filed same date).

Teamsters Local Union No. 48 v. Patrick, No. CU-82-73 (Penobscot County, Me., Super. Ct. filed Feb. 3, 1982).

Maryland:

Beck v. Communications Workers of America, 106 L.R.R.M. 2323 (D. Md. 1981) (recommitting to Special Master).

Massachusetts:

Bates v. Massachusetts Labor Relations Commission, No. 80-1740 (Hampden County, Mass., Super. Ct. filed June 10, 1980).

Becker v. Massachusetts Society of Professors, Boston Chapter, No. MUPL-2200 (Mass. Lab. Rel. Comm'n filed Apr. 13, 1982).

Burchell v. New Bedford Educators Association, No. MUPL-2486 (Mass. Lab. Rel. Comm'n filed May 6, 1982) (12 consolidated cases).

Greenfield School Committee v. Greenfield Education Association, No. MUPL-2494 (Mass. Lab. Rel. Comm'n filed May 10, 1982), *on referral from* No. 14646 (Franklin County, Mass., Super. Ct. Dec. 2, 1980), *on remand from* 385 Mass. 70, 431 N.E.2d 180 (1982).

Herbst v. Educational Association, No. MUPL-2488 (Mass. Lab. Rel. Comm'n filed May 6, 1982).

Michigan:

Abood v. Detroit Board of Education, No. 155255 (Wayne County, Mich., Cir. Ct. filed Apr. 4, 1970), *on remand from* 431 U.S. 209 (1977) (3 consolidated cases).

Acker v. Homer Board of Education, No. 80-115 CZ (Calhoun County, Mich., Cir. Ct. filed Jan. 30, 1980).

Ball v. City of Detroit, No. 70-159940-CZ (Wayne County, Mich., Cir. Ct. filed Jun. 29, 1970), *on remand from* 84 Mich. App. 383, 269 N.W.2d 607 (1978).

Bebermeyer v. Michigan State Employees Association, ULP 81-40-35 (Mich. Civ. Serv. Comm'n filed Oct. 27, 1981).

Central Michigan University Faculty Association v. Stengren, No. 76-006456-CZ (Isabella County, Mich., Cir. Ct. filed May 7, 1976).

Irwin v. Michigan Nurses Association, No. CU 82-D16 (Mich. Empl. Rel. Comm'n filed Apr. 30, 1982).

Kalamazoo County Education Association v. Reisterer, No. C82-100195-CK (Kalamazoo County, Mich., Cir. Ct. filed Jan. 21, 1982).

Lehnert v. Ferris Faculty Association, No. G78-346 CA 1 (W.D. Mich. Aug. 11, 1982) (denying summary judgment).

White Cloud Education Association v. Board of Education, 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal docketed*, No. 66754 (Mich. Mar. 2, 1981).

New Jersey:

Kramer v. Boonton Education Association, No. CI-82-21-123 (N.J. Pub. Empl. Rel. Comm'n filed Nov. 16, 1981).

Olsen v. Communication Workers of America, No. 82-3443 (D.N.J. filed Oct. 3, 1982).

Robinson v. New Jersey, 1981-83 Pub. Bargaining Cas. (CCH) par. 37,624 (D.N.J. Sept. 28, 1982) (order granting preliminary injunction) (2 consolidated cases).

New York:

Haag v. Churchville-Chili Education Association, No. 12665/80 (Monroe County, N.Y., Sup. Ct. filed Aug. 28, 1980).

Havas v. Communications Workers of America, 509 F.Supp. 144 (N.D.N.Y. 1981) (partial summary judgment).

Ohio:

Collins v. Youngstown State University Chapter of Ohio Civil Service Employees' Association, No. 79-CB-798 (Mahoning County, Ohio, C.P. filed Apr. 23, 1979), *on remand from* Case No. 79 C.A. 110 (Ohio Ct. App., 7th Dist., Apr. 14, 1981).

Pymatuning Valley Education Association v. Daniel, No. 82 CVF 374 (Ashtabula, Ohio, County Ct. filed Aug. 3, 1982) (3 consolidated cases).

Youngstown State University Chapter of Ohio Education Association v. Ritter, No. 81-CV-885 (Mahoning County, Ohio, C.P. filed May 29, 1981) (and 3 other cases filed same date).

Washington:

Hordyk v. International Brotherhood of Teamsters, No. 51368 (Thurston County, Wash., Super. Ct. Jul. 31, 1979) (interlocutory decision as to liability).

Wisconsin:

Browne v. Milwaukee Board of School Directors, Case XCIX No. 23535 MP-892 (Wis. Empl. Rel. Comm'n Feb. 3, 1981) (initial findings and conclusions), *on referral from* No. 410-584 (Milwaukee County, Wis., Cir. Ct. Aug. 22, 1977), *on remand from* 83 Wis.2d 316, 265 N.W.2d 559, 267 N.W.2d 379 (1978).

Chentnik v. Richfield Education Association, Case I No 27171 MP-1176 (Wis. Empl. Rel. Comm'n filed Dec. 31, 1980).

Gerleman v. Milwaukee Board of School Directors, Case C No. 23558 MP-897 (Wis. Empl. Rel. Comm'n May 24, 1982) (initial findings and conclusions), *on referral from* No. 416-740 (Milwaukee County, Wis., Cir. Ct. Aug. 22, 1977).

Johnson v. County of Milwaukee, Case CLXI No. 29581 MP-1322 (Wis. Empl. Rel. Comm'n filed Mar. 19, 1982), *on referral from* No. 411-578 (Milwaukee County, Wis., Cir. Ct. Dec. 12, 1978).

No. 82-1150

Office-Supreme Court, U.S.
FILED
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CLERK

IN THE
Supreme Court of the United States

October Term, 1982

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners Howard Ellis, *et al.*, and Allen L. Fails, *et al.*, file this supplemental brief pursuant to Sup. Ct. R. 22.6, to bring to this Court's attention a new decision in *Beck v. Communication Workers of America*, 1983 Daily Lab. Rep. No. 48, D-1 (D. Md. Mar. 4, 1983), issued subsequent to the filing of the petition in this case on January 7, 1983. The district court's prior decision in *Beck v. Communication Workers of America*, 468 F.Supp. 93 (D. Md. 1979), was cited to this Court in the

petition as one of the federal district court decisions which conflict with the Ninth Circuit's majority opinion in this case. On March 4, 1983, the district court issued another decision in *Beck* which sharpens the conflict between that case and the majority decision in *Ellis*.

HISTORY AND ANALYSIS OF THE *BECK* LITIGATION

The complaint in *Beck* was filed on June 4, 1976, by eighteen employees of various Maryland subsidiaries of the American Telephone and Telegraph Company and the Chesapeake and Potomac Telephone Company who were employed under collective bargaining agreements between their employers and the Communication Workers of America ("CWA"). The plaintiffs, nonmembers of CWA, alleged that a percentage of their compelled agency fees were spent over their objection for purposes other than collective bargaining, contract administration, and grievance adjustment in violation of the First Amendment.

On March 16, 1979, the court entered its decision and declaratory judgment. Drawing from this Court's decision in *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), the district court held that CWA had collected and continued to collect agency shop fees from plaintiffs in amounts beyond that allocable to collective bargaining, contract administration, and grievance adjustment. This conduct was held to violate the plaintiffs' First Amendment rights. 468 F.Supp. at 97. The district court referred to a special master the issue of the amount of plaintiffs' agency fees spent for purposes other than collective bargaining, contract administration, and grievance adjustment. On this issue, the burden of proof was placed upon CWA. *Id.*

On March 3, 1979, the district court appointed Special Master Wilson K. Barnes, a retired judge from Maryland's Court of Appeals. Proceedings before the special master commenced on May 15, 1979, and con sumed twenty-seven days of hearing and one full day of argument of counsel. The record of testimony consisted of 3,844 pages of transcript. More than 2,100 documentary exhibits were admitted.

On August 18, 1980, Special Master Barnes filed a detailed forty-two page written report containing his findings of fact and conclusions of law. *Beck v. Communication Workers of America*, 1980 Daily Lab. Rep. No. 166, D-1 (D. Md. Aug. 18, 1980).

The special master confirmed the district court's decision that *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963), required that CWA carry the burden of proof in demonstrating the amount of permissible expenditures and held that the burden must be met by "clear and convincing evidence." 1980 Daily Lab. Rep. No. 166 at D-1, D-3. The special master defined precisely the terms "collective bargaining," "contract administration," and "grievance adjustment." He set forth the following for determining whether expenditures which are not clearly embraced within collective bargaining, contract administration, and grievance adjustment were permissible: an expenditure is permissible only if it "*directly relates to* and is *reasonably necessary for the proper effectuation of*, collective bargaining, contract administration and grievance adjustment." *Id.* at D-4 (emphasis in original). The special master initially found that a variety of union expenditures were impermissible, including expenditures for political purposes, community services, labor legislation, and organizing. *Id.* at D-5.

Various other items claimed by CWA to be expenditures for collective bargaining, contract administration, and grievance adjustment also were found impermissible in whole or in part. The disallowance of these items was based primarily on the finding that, because CWA failed to maintain its records in accordance with generally accepted accounting principles, it had failed to meet its burden of proof that the expenditures were permissible. *Id.* at D-8.

Although CWA contended that one hundred percent (100%) of its expenditures were chargeable except political expenditures amounting to less than two percent (2%) of the fees for the years 1977 through 1980, the special master concluded that eighty-one percent (81%) of CWA's expenditures of agency fees were impermissible. Therefore, he required a refund to plaintiffs of eighty-one percent (81%) of their agency fees. A permanent injunction was recommended restraining CWA from charging or collecting in excess of nineteen percent (19%) of the amount of regular dues, assessments, or other payments required of union members. That percentage was subject to modification upon a proper showing by CWA that a greater portion was chargeable to plaintiffs. *Id.* at D-13. (App. at 3a)*

On motion of CWA, the district court entered an order on January 19, 1981, recommitting the matter to the special master: (1) to determine

* "(App. at ____)" refers to pages of the appendix to this brief.

whether the union's allegedly new record-keeping policies should alter the previous factual findings of the special master, and (2) to fashion a final injunction in the case. *Beck v. Communication Workers of America*, 106 L.R.R.M. 2323 (D. Md. 1981).

On recommittal, the special master held a number of conferences and hearings resulting in over 800 additional pages of transcript, and receipt of another 2,313 exhibits, in addition to extensive expert reports on CWA's record-keeping and accounting systems.

On September 14, 1981, Special Master Barnes issued his fifty-three page supplemental report. *Beck v. Communication Workers of America*, Civ. No. M-76-839 (D. Md. Sept. 14, 1981). The special master found that no facts had been presented to change the previously determined result that eighty-one percent (81%) of CWA's expenditures were for impermissible purposes. Slip op. at 50. (App. at 5a)

All other pertinent findings and conclusions in the special master's original report were reaffirmed and incorporated into the supplemental report, except that the special master modified the previous recommendation for a permanent injunction. In his supplemental report, he proposed that CWA be permanently enjoined from prospectively charging or collecting from plaintiffs for each year an amount certified as impermissible by an independent certified public accountant subject to objections by the plaintiffs. The injunction also included provisions requiring the union to place in an interest-bearing escrow account a portion of the agency fees paid by plaintiffs equal to twice the amount determined in the previous fiscal year to be impermissible. It required CWA to pay plaintiffs' counsel and expert fees in connection with a review of the certified impermissible amount. *Id.* at 51-52. (App. at 7a-8a)

The parties filed objections, motions, and memoranda directed to the supplemental report. The district court on March 4, 1983, issued its memorandum and order for judgment. *Beck v. Communication Workers of America*, 1983 Daily Lab. Rep. No. 48, D-1 (D. Md. Mar. 4, 1983) (App. at 10a-22a).

With the modifications expressed in its own opinion, the district court adopted the special master's original and supplemental reports. *Id.* at D-4 (App. at 21a)

The district court specifically held that:

(1) The special master's supplemental report regarding the calculation of permissible versus impermissible expenditures must be applied to the local unions as well as the international union. Application of the same percentages was required due to the local unions' failure to meet the burden of proof that any other percentage was appropriate. *Id.* at D-2 (App. at 15a-16a).

(2) The evidence offered by CWA failed to prove that the fees spent for organizational purposes were used "to benefit collective bargaining *in this case.*" *Id.* at D-2 (App. at 16a) (emphasis in original).

(3) CWA's burden of proof was that of persuasion, not merely that of going forward with the evidence. Relying on *Abood* and *Buckley v. Valeo*, 424 U.S. 1 (1976), the district court concluded that the burden must be met by "clear and convincing evidence." 1983 Daily Lab. Rep. No. 48 at D-2, D-3 (App. at 16a-18a).

(4) Where CWA did not maintain adequate time records as suggested in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), and *Allen*, the union failed to meet its burden of proof on permissible expenditures. 1983 Daily Lab. Rep. No. 48 at D-3 (App. at 18a).

Adjusting some simple mathematical errors in the special master's report to arrive at total impermissible expenditures of seventy-nine percent (79%), the district court concluded that judgment should be entered for plaintiffs in an amount equal to seventy-nine percent (79%) of the agency fees paid by plaintiffs from January 1, 1976, through March 31, 1983; that plaintiffs should also be granted the permanent injunctive relief set forth in the special master's supplemental report; and that CWA should pay one hundred percent (100%) of the costs, including compensation of the special master. *Id.* at D-3, D-4 (App. at 21a-22a).

THE DIRECT CONFLICTS BETWEEN *BECK* AND THE MAJORITY DECISION IN *ELLIS*

The district court's March 4, 1983 decision (including its incorporation of the special master's reports) places *Beck* in direct conflict with the majority decision in *Ellis* on each of the three issues as to which review is sought in this case.

First, *Beck* articulated a precise rule consistent with *Abood*, for the line between permissible and impermissible uses of compulsory fees: only an expenditure which "*directly relates to* and is *reasonably necessary for the proper effectuation of*, collective bargaining, contract administration and grievance adjustment" may be charged to dissenters. 1980 Daily Lab. Rep. No. 166 at D-4. On the other hand, the majority decision in *Ellis* applied a novel, murky test of chargeability: that expenditures need only be somehow "germane to the union's work in the realm of collective bargaining." 685 F.2d at 1072.

Second, the permanent injunctive relief in *Beck* requires CWA to escrow a portion of the agency fees paid by plaintiffs equal to twice the amount determined in the previous fiscal year to be impermissible (and thus refrain from spending the compulsory fees) until an amount certified to be impermissible has been approved. The amount certified as impermissible is subject to close scrutiny by plaintiffs' counsel and experts, and to possible court review, with CWA bearing the costs of plaintiffs' counsel and experts for services in connection with that scrutiny (App. at 7a-8a, adopted at 21a). The majority decision in *Ellis*, however, ignored the prior restraint inherent in spending dissenters' fees before certification of permissible expenditures, and endorsed an unmonitored rebate scheme permitting collection and expenditure of compulsory fees for impermissible purposes if some portion of the impermissible expenditures is ultimately rebated. 685 F.2d at 1069-70.

Third, *Beck* imposed the "clear and convincing evidence" standard required in cases involving fundamental constitutional rights and demanded that the requisite burden of proof be met from records maintained in accordance with generally accepted accounting principles. (App. at 18a). In contrast, the majority decision in *Ellis* required proof by only a preponderance of the evidence and held generally accepted accounting principles to be irrelevant to the union's burden of proof. 685 F.2d at 1070-71.

CONCLUSION

This new decision in *Beck* further demonstrates that the questions presented for review in this case are important questions of federal law which have not been, but should be, settled by this Court. The Court, therefore, should grant this petition for certiorari.

Respectfully submitted,

Michael E. Merrill

Counsel for Petitioners

APPENDIX

Report of the Special Master

Filed in the U.S. District Court
for the District of Maryland on August 18, 1980

1980 Daily Lab. Rep. No. 166, D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HARRY E. BECK, JR., et al *

Plaintiffs *

v. * Civil No. M-76-839

COMMUNICATIONS WORKERS OF AMERICA (CWA), et al *

Defendants *

* * * * * * *

REPORT OF WILSON K. BARNES, SPECIAL MASTER

* * *

Findings of Fact

The Special Master makes the following findings of fact:

1. The items of expenditure by CWA during the fiscal year beginning April 1, 1977, and ending March 31, 1978 (Fiscal 1977-78), are characteristic of the expenditures of CWA for all periods from and after January 1, 1976.

2. The total expenditures by CWA during Fiscal 1977-78 are $29,240,000.

3. The expenditures by CWA for Fiscal 1977-78 for Administrative purposes amounted to $8,065,000.

4. Of the amount of expenditures by CWA for Fiscal 1977-78 for Administrative purposes of $8,065,000, 24%, or $1,212,000, were permissible expenditures as calculated on Schedule E, hereto attached, and should be allocated to the total of permissible items of expenditure for Collective Bargaining, Grievance Adjustment and Contract Administration.

5. The total expenditures for the 10 categories set forth in Appendix C, hereto attached, of $4,424,000, together with the amount of $1,212,000 mentioned in Finding of Fact No. 4, supra, a total of $5,636,000, are directly connected with, and are reasonably necessary for the effectuation of collective bargaining, grievance adjustment and contract administration and are permissible items of expenditure.

6. The percentage of total permissible expenditures of the total expenditures of CWA during Fiscal 1977-78 is 19%, as calculated on Schedule E, hereto attached.

7. The percentage of total impermissible expenditures of CWA during Fiscal 1977-78 is 81%, as calculated on Schedule E, hereto attached.

Conclusions of Law

The Special Master, in addition to the Conclusions of Law heretofore made by the Court, submits the following Conclusions of Law:

1. It is proper for the Special Master to use as a rule or guide in determining whether or not items of expenditure by CWA are permissible and properly chargeable against the amounts paid by the Plaintiffs as Agency Fee Payors to CWA that such item of expenditure is directly connected with and is necessary for the effectuation of collective bargaining, grievance adjustment and contract administration.

2. "Collective Bargaining, Grievance Adjustment and Contract Administration" are properly defined as set forth in Pages 10 and 11 of this Report.

3. It is proper for the Special Master to use the expenditure of CWA for Fiscal 1977-78 as characteristic of the other periods of time involved in this action and to use such expenditures for the calculation of the percentage of permissible expenditures which may properly be charged to

the Plaintiffs, as Agency Fee Payors of CWA, and the percentage of impermissible expenditures which may not be so charged.

4. CWA must refund to the Plaintiffs listed in Schedule F, hereto attached, 81% of the amounts heretofore paid by them to CWA as Agency Fee Payors including the amounts listed in Schedule F and such additional amounts up to the date of filing this Report as the Plaintiffs may establish and a monetary judgment for those amounts should be entered by the Court.

5. The Plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge and collect from the Plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to the Plaintiffs as Agency Fee Payors.

6. The items of expenditure mentioned under the heading "Allocation of Costs" on page 39 of this Report are properly taxable as costs in this case and those costs, as well as any other costs in the case will be paid 81% by the Defendants and 19% by the Plaintiffs.

7. Claims for counsel fees or punitive damages are not passed upon by the Special Master and the filing of the Report is without prejudice to, or waiver of, any such claims.

Recommendations by the Special Master to the Court

The Special Master recommends to the Court that:

1. The Report of the Special Master be adopted and the aforegoing Findings of Fact and Conclusions of Law be adopted, applied and confirmed by the Court.

2. In view of the length of the Report of the Special Master and the substantial number of issues, exhibits and figures involved, the time within which the parties may file exceptions, if any, to the Report be enlarged from the 10 day period provided for in Federal Rule 53(e)(2), to

30 days from the date of filing the Report in the Court. A form of suggested order is submitted herewith for the recommended extention time.

Respectfully Submitted

Dated: August 18, 1980

Wilson K. Barnes, Special Master

**Supplemental Report of Special Master
Filed in the U.S. District Court
for the District of Maryland on September 14, 1981**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HARRY E. BECK, JR., et al. *

Plaintiffs *

v. * CIVIL ACTION NO. M-76-839

COMMUNICATIONS WORKERS OF AMERICA, et al. *

Defendants *

* * * * * * * * * *

SUPPLEMENTAL REPORT OF WILSON K. BARNES,
SPECIAL MASTER

* * *

Findings of Fact

The Special Master makes the following findings of fact:

1. The Special Master reaffirms Findings of Fact Nos. 1-7, inclusive, appearing on page 40 of the Original Report.

2. No facts have been presented in the hearings in Phase II which, at the time of the filing of this Supplemental Report, change the percentage of 19 percent of the total permissible or retainable expenditures or of 81 percent of impermissible or non-retainable expenditures of the CWA Defendants as calculated on Schedule E attached to the Original Report as found by the Special Master in Findings of Fact Nos. 6 and 7 in the Original Report.

Conclusions of Law

The Special Master, in addition to the Conclusions of Law heretofore made by the Court, submits the following Conclusions of Law:

1. The Special Master reaffirms and incorporates here the Conclusions of Law Nos. 1, 2, 3 and 4 set forth on page 41 of the Original Report.

2. In *addition* to Conclusion of Law No. 4 appearing on page 41 of the Original Report, the Special Master presents the following Conclusion of Law:

4-A. CWA must refund to the Plaintiffs in Schedule F attached to the Original Report, in addition to the amounts payable to them as provided in Conclusion of Law No. 4 on page 41 of the Original Report, 81 percent of the amounts paid by them to CWA as Agency Fee Payors from the time of filing of the Original Report on August 18, 1980 and the date of filing of this Supplemental Report to and including July 31, 1981 as the Plaintiffs may establish and a monetary judgment for those amounts should be entered by the Court in addition to the amounts mentioned in Conclusion of Law No. 4 on page 41 of the Original Report. The CWA Defendants shall pay such amount found to be due to the Plaintiffs into, and hold in, an interest-bearing escrow account, and in addition, shall pay at the end of each fiscal year of CWA subsequent to the filing of this Supplemental Report, the portion of the agency fees paid by each Plaintiff during each succeeding fiscal year, an amount equal to twice the amount determined in the previous fiscal year to be non-retainable, all pending the determination called for in Conclusion of Law No. 5, *infra*.

3. The Special Master adds, as a result of the testimony, exhibits, authorities cited and arguments made by counsel for the respective parties, the following additional Conclusion of Law:

4-B. The new system of CWA cost accounting, timekeeping and record-keeping, subject to the changes and additions recommended by the Special Master on page 45 of the Supplemental Report are, prima facie, a proper means for the CWA Defendants to seek to meet the burden of proof to which they are now subject by virtue of the prior holdings of the Court and of the Special Master in the Original Report for determining the percentage of agency fees paid by the Plaintiffs as

Agency Fee Payors that is retainable by CWA and the percentage which is not retainable.

4. The Special Master modifies Conclusion of Law No. 5 on page 41 of the Original Report to read as follows:

5. The Plaintiffs listed in Schedule F attached to the Original Report are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge and collect from the Plaintiffs for the period August 1, 1981 to March 31, 1982 and for each fiscal year of CWA thereafter, the amount certified as non-retainable by an independent Certified Public Accountant commissioned by the CWA Defendants who has used the new system of record-keeping and allocations designed by the experts of CWA as set forth on page 43 of this Supplemental Report after supplying certain defects and omissions set forth on pages 45 and 46 of this Supplemental Report and subject to the additional provisions for monitoring set forth on pages 46 to 48 of this Supplemental Report. The Plaintiffs through their counsel and an expert or experts selected by him shall have the right upon the issuance of such report to review the workpapers of the Certified Public Acountant and of the time recording and sampling expert who prepared the report, and who monitored the operation of the new system during the period involved. If, within 45 days from the date on which the Plaintiffs have been granted access to those papers as above provided, counsel and the experts of the Plaintiffs disagree with the methods used in the preparation of and the conclusions stated in the report, they shall file with the Court a statement indicating the basis of such disagreement. If no such statement is filed, the CWA Defendants on the 46th day after the issuance of the report shall pay to the Plaintiffs the amount stated in the report. If such a statement is filed, the Court on the papers or after such hearing as the Court may deem proper shall determine the non-retainable amount. The CWA Defendants shall each fiscal year hold in an interest-bearing escrow account a portion of the agency fees paid by each Plaintiff equal to twice the amount determined in the previous fiscal year to be non-retainable pending the determination above set forth. The CWA Defendants, as part of the monitoring expense for their new system, shall pay to the Plaintiffs an amount of money representing the reasonable value of the services of counsel and the experts of the Plaintiffs in connection with the review from time to time as above set forth. If the parties cannot agree upon the amount to be paid for such services, the Plaintiffs may submit by motion the question of the amount of such reasonable compensation to the Court for

determination, which, after hearing the CWA Defendants, will award a monetary judgment to the Plaintiffs for the amount determined by the Court.

6. The Special Master reaffirms and incorporates here Conclusion of Law No. 6 as set forth on page 41 of the Original Report and in addition thereto adds the following:

All taxable costs which have accrued in the case since the filing of the Original Report on August 18, 1980 and the date of the filing of this Supplemental Report shall be paid 81 percent by the CWA Defendants and 19 percent by the Plaintiffs.

7. The Special Master reaffirms and incorporates here Conclusion of Law No. 7 as set forth on page 42 of the Original Report.

8. The Special Master does not decide the request of the Plaintiffs for the allowance of counsel fees for the reasons set forth on pages 49-50 of this Supplemental Report and without prejudice to any proceeding in the Court upon this issue from the decision of the Special Master not to pass upon this issue.

Recommendations by the Special Master to the Court

The Special Master recommends to the Court that:

1. This Supplemental Report, as well as the Original Report, be adopted and the aforegoing Findings of Fact and Conclusions of Law, as well as the Findings of Fact and Conclusions of Law in the Original Report, except as such Conclusions of Law shall have been modified or amplified by the Conclusions of Law in this Supplemental Report, be adopted, applied and confirmed by the Court.

2. In view of the length of this Supplemental Report of the Special Master and the substantial number of issues, exhibits and pages of testimony involved, the time within which the parties may file exceptions, if any, to the Supplemental Report be enlarged from the ten-day period provided for in Federal Rule 53(e)(2) to thirty days from the date of filing

the Supplemental Report in the Court. A form of suggested order is submitted herewith for the recommended extension of time.

Respectfully submitted,

Dated: September 14, 1981

Wilson K. Barnes, Special Master

Memorandum and Order of the U.S. District Court for the District of Maryland Issued on March 4, 1983

1983 Daily Lab. Rep. No. 48, D-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

HARRY E. BECK, JR., et al. Plaintiffs v. COMMUNICATION WORKERS OF AMERICA, et al. Defendants	CIVIL ACTION NO. M-76-839

MEMORANDUM AND ORDER

STATEMENT OF THE CASE

The complaint in this action was filed on June 4, 1976 by eighteen employees of various Maryland subsidiaries of the American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P). The plaintiffs are employed under collective bargaining agreements between their employers and the Communication Workers of America (CWA). Under the contracts, CWA, CWA District II, and CWA Locals 2100, 2101, 2108 and 2110 are the exclusive representatives of the employees. Plaintiffs, while they have not sought to become members of CWA, are subject to the collective bargaining agreements which require that they pay to CWA, as a condition of employment, an amount equal to the periodic dues and assessments of the union.

The plaintiffs have alleged that their agency fees are, at least in part, used to support partisan political or ideological causes unrelated to collective bargaining. The plaintiffs have objected to such expenditures and to other non-collective bargaining expenditures, alleging a violation of their First Amendment right to express themselves without governmental control and without prior governmental restraint.

On March 16, 1979, the late C. Stanely Blair, a judge of this court, held that the plaintiff agency fee payors were entitled to a declaratory judgment that the requirement of the payment by them of fees to finance activities other than "collective bargaining, contract administration and grievance adjustment," was improper. The judgment order referred the case to a special master for determination of "the percentage of the defendant's budget dispersed for purposes other than the three permissible ones." (Paper No. 71). The judgment included provisions (1) that if the parties were unable to agree upon a master, the court would appoint one; (2) that if the parties were unable to agree on an equitable allocation of the cost of reference, the court would direct the master to make a recommendation; (3) that once the percentage of the defendant's budget dispersed for impermissible purposes had been determined, the plaintiffs would be entitled to a refund of the excess paid by the plaintiffs for the period since January 1, 1976; and (4) that the judgment was conditioned on the plaintiffs' dismissal of the AFL-CIO and its named affiliates as defendants. The AFL-CIO and its named affiliates were dismissed, with prejudice, on March 30, 1979. The parties were not able to agree upon a master, and on May 3, 1979, Judge Blair entered an Order appointing Honorable Wilson K. Barnes as Special Master.

In his March 16, 1979 Memorandum and Order Judge Blair held as follows:

> "(1) Pursuant to the Agency Shop Clause in its collective bargaining agreement with plaintiffs' employees, the defendant, CWA, has collected and continues to collect from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;
>
> (2) That such collection by the defendant violates the First Amendment rights of the plaintiffs."

(Paper No. 70). The Special Master, on reference, was ordered to make the following determination:

> "The Special Master shall exercise those powers conferred by this Court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, (3) grievance adjustment, all in accordance with the conclusion of law heretofore reached by the undersigned judge in this proceeding."

(Paper No. 73).

On August 18, 1980, Special Master Barnes filed a written report (Paper No. 114), setting forth his findings of fact and conclusions of law in response to the referral order. The defendants subsequently filed a motion to recommit this matter to the Special Master pursuant to Rule 53(e). The motion was granted by the undersigned judge (Paper No. 130) on January 19, 1981.

The first issue resubmitted to the Special Master dealt with his findings relating to the obligations of the Local Unions. The court concluded:

> "The Special Master's report, however, is devoid of any specific findings or conclusions regarding the activities of the Local Unions. Given the fact that the Local Unions retain 60% of the fees in question, the court finds that this matter should be referred back to the Special Master either for clarification or further findings concerning the Local Unions. If the findings of the present report were intended to encompass the defendant locals, the basis of that holding should be set forth. If, on the other hand, the report relates only to the portion of the fees expended by defendant CWA, the Special Master should submit further findings on the following issues:
>
> > (1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;

> (2) What percentage of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous Order of this court."

Further testimony on those issues was not required by the court unless Judge Barnes, in his role as Special Master, deemed it appropriate.

The second issue before the Special Master on recommital involved his determination of future injunctive relief. The Special Master's original report contained the following recommendation:

> "The plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA by such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to plaintiffs as Agency Fee Payors."

The court granted the defendants' motion to recommit the matter to a Special Master to enable the defendants to present additional evidence designed to modify the percentage figure for future injunctive relief. Specifically, the defendants sought to "present evidence to the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment." (Paper No. 130 at 6). The court held that "[t]he injunctive relief regarding future collection should, however, be more flexible," (Paper No. 13 at 6), than that proposed in the Special Master's original report.

On remand the Special Master was requested specifically to submit additional findings on the following issues:

> "(1) Do the unions' current record keeping policies in any way alter the factual finding previously submitted to the court?

(2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activities?

(3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?

(4) How should the final injunction be framed in order to accomplish the objection (sic) set forth in this order and the prior ones in this action?"

(Paper No. 130 at 7).

Finally, the Special Master was required to clarify his original findings with respect to clerical errors. (Paper No. 130 at 8).

On re-reference the Special Master held a series of conferences and hearings on the questions submitted. Detailed briefs were prepared by both sides and discovery was reinstituted, resulting in over 800 additional pages of transcript. The plaintiffs introduced 2,296 exhibits; the defendants introduced 17 and additionally introduced extensive expert reports on CWA's proposed record keeping and accounting systems.

Special Master Barnes submitted his supplementary report (Paper No. 180) on September 18, 1981. The parties filed their objections to the report (Paper Nos. 184-86) and the defendants filed motions for action on the supplementary report (Papers 196, 197, 201). The plaintiffs responded to these motions (Paper No. 203). Finally, the defendants filed for leave to file a motion for judgment (Paper No. 204) with supporting memoranda (Papers 207, 208). The plaintiffs have opposed that motion (Paper Nos. 205, 208) and the defendants have replied (Papers 206, 210). The court has considered the motions and memoranda of the parties and has concluded that an oral hearing on these matters is not necessary. Local Rule 6(E).

OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

A. Application of the Original Report to the Local Unions

With regard to the first issue re-submitted to the Special Master, *i.e.*, findings related to the obligations of the local unions, the local unions, but not the plaintiffs, have objected (Paper No. 186) to the supplemental report. They object on the ground that the supplemental report, like the original report, allegedly fails to make findings with respect to the local unions.

"In an action to be tried without a jury the court shall accept the Master's findings of fact unless clearly erroneous," Fed. R. Civ. P. 53(e)(2). Thus, the task of the district court here in reviewing the Special Master's findings of fact is essentially the same task as faces an appellate court reviewing the findings of fact of a district court. *See* 5A *Moore's Federal Practice*, ¶ 53.12[4] at 53-117 & 119. (2d. ed. 1982). Findings based on oral testimony, based partially on the fact finders' evaluation of witnesses' demeanor and credibility, are entitled to greater deference than are findings based on documentary and other non-demeanor evidence. *Id.* at 53-119. This is particularly true in a case such as this, where the testimony of numerous experts was so crucial.

In his supplemental report, the Special Master has made explicit his intention in the original report that the calculations of applicable percentages of permissible and impermissible expenditures by CWA should be applied also to the four local unions. Furthermore, the Special Master has complied with the court's request that the basis of his holding relative to the local unions be made specific. In pages 2 through 4 of the supplemental report, he explained that the local unions had failed to meet their burden of proof with respect to allocation of costs and that only by evaluating the evidence in the light most favorable to them could the Special Master justify an allocation equal to that of the CWA. The local unions' objection that the Special Master's findings are not supported by evidence (Paper Nos. 186 and 196) is without merit for it was their burden to produce evidence which the Special Master expressly found they failed to do. Furthermore, although the local unions now argue the remedy applied to the CWA is impracticable to apply to them because of their smaller staffs and responsibilities, they failed to pursue this matter before the Special Master on recommittal. This court cannot say that the Special Master's findings are clearly erroneous on this issue. Therefore, the Special Master's supplemental report with respect to the calculation

of permissible expenditures by the local union will be affirmed to the same extent it is affirmed for the CWA.

B. Organizational Fees

Defendant CWA objects to the Special Master's finding that the expenses of organization are not permissible. The defendant relies principally on *American Steel Foundries v. Tri-City Central Trades*, 257 U.S. 184, 209 (1921), in which the Court outlined the importance of organizational activities to a healthy union. It is not disputed that organizing is an important function of the unions, nor that these activities may indirectly benefit unions' collective bargaining positions. The evidence before the Special Master, however, failed to support the conclusion that the fees attributable to organizing were used to benefit collective bargaining *in this case*. This is not to say that with proper evidentiary support a different conclusion would not be reached on other facts. *See Ellis v. Brotherhood of Railway Clerks*, 685 F.2d 1065 (9th Cir. 1982); *Browne v. Milwaukee Board of School Directors*, (Wisconsin Employment Relations Commission, Dec. No. 18408 (Feb. 3, 1982).

C. Burden of Proof

The CWA contends that the Special Master erred in imposing on the defendants the burden of proving permissible expenditures by clear and convincing evidence. Their first argument is that the defendant's burden as imposed by *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), should merely be one of going forward with the evidence, not one of persuasion. In support of this argument they cite the Title VII case of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The opinion of Judge Blair (Paper No. 70) leaves no doubt that the burden placed on the defendants was one of persuasion. For this reason alone, if for no other, the court believes the doctrine of the law of the case dictates that the burden not be shifted at this time. Additionally, *Burdine*, on which the defendants rely, was not decided at the time of Judge Blair's decision. In any event, *Burdine* involved a Title VII claim and no such claims have been raised here. This court does not agree with the defendants' broad reading of *Burdine* which would apparently

reassign to all plaintiffs in all phases of all actions the burden of proof. There is nothing in *Burdine* to justify its application beyond Title VII.

In addition, the defendant CWA argues that the Special Master erred in imposing a standard of "clear and convincing" evidence. Although this court agrees with the defendant and the Ninth Circuit, *Ellis v. Brotherhood of Railway Clerks, supra* at 1070, that the Special Master erred in relying on *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), to support his conclusion that the appropriate standard was "clear and convincing evidence," the court disagrees with the conclusion that it was error to apply the standard at all.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), the Supreme Court cited *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that:

> "Contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals,' the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interest.'"

431 U.S. at 234 (*quoting* from *Buckley*; citations omitted).

The Court then concluded that there was no significant difference for First Amendment purposes between limiting a campaign contribution and compelling contribution.

> "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced. . . ."

431 U.S. at 234 through 235 (footnotes omitted).

What is significant is that the Supreme Court held the expenditure limitations at issue in *Buckley* to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," 424 U.S. at 44-45. *See* 424 U.S. at 16. This was consistent with numerous prior decisions determining that prior restraints on First Amendment freedoms carry a heavy presumption against their validity. *See, e.g., Heller v. New York*, 413 U.S. 491 (1973); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Tetel Film Corp. v. Cusack*, 390 U.S. 139 (1968). Given the basic First Amendment freedoms at issue in this case and the solicitude with which the Supreme Court has protected them, the Special Master was justified in applying a "clear and convincing evidence" test in this action.

D. Adverse Inferences

The defendant CWA also objects to the adverse inferences drawn by the Special Master from the failure of the CWA to produce 30 employees of CWA to testify regarding their allocation of time to permissible projects. There is no contention here that the defendant could not produce the witnesses, and the Special Master found that the plaintiffs had produced evidence indicating that "most of the 30 employees mentioned . . . are presently engaged in activities which are not 'collective bargaining, contract administration, and grievance adjustment.'" (Paper No. 114 at 22). Thus, the adverse inference rule was correctly applied. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2nd Cir. 1981); *Blow v. Compagnie Maritime Belge*, 395 F.2d 74 (4th Cir. 1968).

The defendant CWA also contends that the Special Master drew impermissible adverse inferences from the failure of the CWA to maintain adequate time records as suggested in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Allen, supra*. While it is true that the Special Master admonished the CWA for failing to keep its time record (Paper No. 118 at 23-24), his decision was, nevertheless, based, not on adverse inferences from the non-production of such records, but on the finding that without them CWA failed to meet its burden of proof, *id.* at 24.

E. Miscalculations

The Special Master determined that the dollar amounts of permissible expenditures for collective bargaining, contract administration, and grievance adjustment, equaled $4,424,000 in a total expenditure of $29,240,000. Likewise, the Special Master determined expressly that $5,052,000 of the total administrative expenses of $8,065,000 were permissible (Paper No. 114, Appendix D), but a portion of these "permissible" administrative expenses were attributable to impermissible activities in the same proportion that all non-administrative permissible activities bore to non-administrative impermissible activities. (The point raised by the plaintiffs (Paper No. 203 at 27) is well taken. The administrative expenses of $5,052,000 characterized as "*permissible*" should have been termed "allocable" to reduce confusion.) Therefore, the Special Master applied the calculation formula supplied by Dr. Bean, an expert produced by CWA, to arrive at the percentage of the total expenditures which constituted permissible expenses and applied that percentage to the allocable administrative expenses to arrive at that part of $5,052,000 which was attributable to collective bargaining, grievance adjustment and contract administration. The total of permissible expenses for collective bargaining, grievance adjustment and contract administration, or $4,424,000, was divided by the total expenditure excluding cost of administration. The Special Master determined that this produced a figure of approximately 24%. (This finding is clearly erroneous as this calculation properly gives a figure of approximately 21%.) Based on the Bean formula, the percentage of allocable administrative cost of $5,052,000 attributable to collective bargaining, grievance adjustment, and contract administration was 24% or $1,212,000. The administrative costs attributable to collective bargaining, grievance adjustment and contract administration thus equaled $1,212,000. This figure added to the costs of collective bargaining, grievance adjustment and contract administration equaled $5,636,000. The percentage of $5,636,000 to the total expenditure is approximately 19% which the Special Master held was the percentage of permissible costs.

Application of the Bean formula has not been shown to be clearly erroneous, but the mathematical computation has. The percentage of permissible non-administrative expenditures to the whole should have been 21%. Twenty-one percent of $5,052,000 is $1,060,920 producing a total of permissible expenditures of $6,112,920 which produces a

percentage of permissible expenditures of 21% ($6,112,920 divided by $29,240,000). The total impermissible expenditure is, thus, 79% (100% minus 21%).

F. Application of Calculation to Years Other Than 1978

The plaintiffs argued on recommittal that the 19/81 percentages (now 21/79) could not be applied to any year other than 1978. The Special Master concluded, however, that Dr. Bean's assertion that 1978 was a typical year was credible (Paper No. 114 at 8 and 13). The plaintiffs have cited the court to no evidence rebutting this finding and, therefore, the court does not find it clearly erroneous.

G. Injunctive Relief

All parties object to the injunction as proposed by the Special Master. (Paper 182 at 51-52). The defendants' proposed modifications are premised on issues addressed previously and need not be repeated here as the court has rejected them for the reasons stated. The plaintiffs' primary objection is that the proposed injunction is too vague to fall within the clear and precise standards applicable to First Amendment issues. The scheme accepted by the Special Master is admittedly not precise and clear, but it does fit within the stated expectations of the Supreme Court in *Allen, supra* at 122, that "absolute precision in the calculation of [the proportion of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." The Supreme Court's caveat is equally applicable in this constitutional challenge as it was in the statutory challenge before the *Allen* court.

The plaintiffs also take exception to the language of the Special Master which suggests how the defendants may meet their burden in the future. Such language is *dicta* and as such the court considers it, if erroneous, to be harmless.

H. Costs Allocation

The plaintiffs protest the allocation of 19% of the cost to them as prevailing parties. The court finds this protest well founded and

pursuant to Rule 53(a), Fed. R. Civ.P., will direct that the defendants pay the entire amount of compensation of the Special Master.

I. Clerical Errors

There being no objection by any of the parties, the corrections of the two clerical errors noted in the court's Order of recommittal are adopted. (Paper No. 103 at 8).

CONCLUSION

The original report of the Special Master (Paper No. 114) as modified by the supplemental report of the Special Master (Paper No. 182) is adopted with the modifications expressed herein.

Judgment will be entered against the defendants and in favor of the plaintiffs for the agency fees paid from January 1, 1976 to August 18, 1980 in the following amounts:

Doris Ambrose	$340.89
Jacqueline S. Brandon	$340.89
Rue Downey	$184.86
Kathleen Heil	$126.40
Clay Lutz	$184.86
Roland Merkle	$224.36
Doris Morrow	$104.28
Frances Philips	$324.07
Lois Stallings	$324.07
Harry Swartz, Jr.	$328.26
John Hurley	$444.41
Harriet Lipschultz	$441.53
Barbara McGaughey	$ 86.90
Marion Northrop	$441.53
Mary Anna Cox	$283.63
Ethel Merryman	$308.50
Vivian Reedy	$282.82
Barbara Russell	$319.18

Judgment will also be entered for the plaintiffs listed above against the defendants for 79% of the agency fees paid from August 18, 1980 to

March 31, 1983. By separate order, the plaintiffs will be required to submit affidavits setting forth the amount of agency fees paid during this period.

Judgment will also be entered in favor of the plaintiffs granting them permanent injunctive relief.

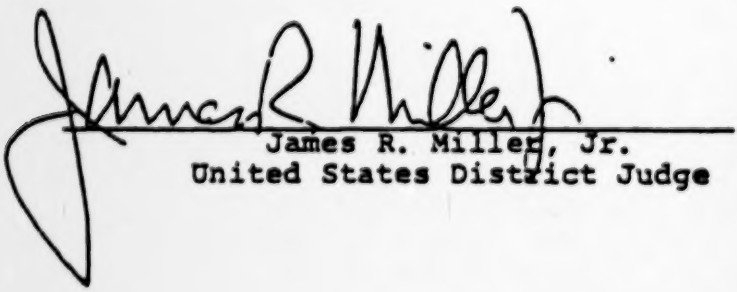
Judgment will be entered for plaintiffs against defendants for 100% of costs, including compensation of the Special Master. Because the parties have to date each paid 50% of said compensation, the plaintiffs will be ordered to advise the court of the total compensation to enable the court to enter judgment for plaintiffs for the amount paid by them.

Accordingly, it is this 4th day of March, 1983, by the United States District Court for the District of Maryland, ORDERED:

(1) The plaintiffs shall submit affidavits setting forth the amount of agency fees paid from August 18, 1980 to March 31, 1983 within twenty (20) days of the date of this Order.

(2) The plaintiffs shall advise the court of the total compensation paid or owed the Special Master by them within twenty (20) days of the date of this Order.

(3) The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.



James R. Miller, Jr.
United States District Judge

Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1150

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX — VOLUME I

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(Continued)

PETITION FOR CERTIORARI FILED JANUARY 7, 1983.
CERTIORARI GRANTED APRIL 18, 1983.

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RELEVANT DOCKET ENTRIES*

In the United States District Court
for the Southern District of California

A. Documents filed in Ellis prior to consolidation

Ellis Docket No.	Description of Document Filed	Date Filed
1	Complaint for judgment, monetary damages and injunctive relief	3/20/73
21	First amended answer to complaint	10/3/73
41	Amendment to complaint	3/1/74 (lodged)
46	Answer to first amended complaint	3/11/74

B. Documents filed in Fails prior to consolidation

Fails Docket No.	Description of Document Filed	Date Filed
1	Complaint for judgment, monetary damages and injunctive relief	3/23/73

* *Howard Ellis, et al. v. Brotherhood of Railway, Airline and Steamship Clerks, et al.*, Case No. CV-73-1113 ("Ellis"); and *Allen L. Fails, et al. v. Brotherhood of Railway, Airline and Steamship Clerks, et al.*, Case No. CV-73-1118 ("Fails"), were filed as separate actions in the United States District Court for the Southern District of California in March, 1973. Thereafter, on February 5, 1974, these cases were consolidated. For ease of reference by this court, most documents filed in each of the aforementioned actions prior to consolidation will be grouped together under each of the *Ellis* or *Fails* heading. All documents included in this joint appendix filed after consolidation will be grouped under another separate heading.

24	First amended answer to complaint	10/3/73
40	Amendment to complaint	3/1/74 (lodged)
45	Answer to first amended complaint	3/11/74

C. Documents filed in Ellis and Fails subsequent to consolidation

Ellis Docket No.	Fails Docket No.	Description of Document	Date Filed
26	28	Stipulation and order for consolidation	2/7/74
121	145	Notice of motion and moton for summary judgment, memorandum of points and authorities in support of motion for summary judgment, with exhibits, and affidavit of Eric Scott Royce and Report on BRAC Legislative Activity.	8/26/75
141	161	Supplemental affidavit of Irving B. Ross and Exhibits "E" through "O"	10/6/75
155	171	Affidavit of Leslie E. Dennis, Exhibit G to defendants' opposition to plaintiffs' motion for summary judgment	11/17/75
155	171	Affidavit of Lloyd Ulman, Exhibit U to defendants' opposition to plaintiffs' motion for summary judgment	11/17/75

---	---	Affidavit of Willard Wirtz, Exhibit X to defendants' opposition to plaintiffs' motion for summary judgment	1/9/76
158	175	Findings of undisputed facts and conclusions of law	1/21/76
169	186	Amended order granting interlocutory summary judgment	4/14/76
212	224	Order amending interlocutory summary judgment and granting defendants' motion to relieve defendants of the requirement of further answers to interrogatory no. 5	11/29/76
257	269	Affidavit of William L. Scheri	11/25/77
265	281	Defendants' reply memorandum in support of motion in support of entry of final order, page 4 n.2	12/19/77
---	---	Transcript of proceedings	1/16/78
279	296	Pretrial order	4/11/78
291	308	Defendants' Exhibit List, Exhibits B, CA, CB, CE, CF, CH, CI, CJ, CR, CS, and CV	6/29/78
301	320	Appendix II to defendants' post trial review	10/12/78

313	331	Defendants' reply memorandum, page 39, ¶94	7/16/79
---	---	Transcript of proceedings p. 1326 l. 11 - p. 1327 l. 2	10/23/79
---	---	Transcript of proceedings	8/1/78
---	---	Transcript of proceedings	8/2/78
---	---	Transcript of proceedings	8/3/78
---	---	Transcript of proceedings	8/4/78
---	---	Transcript of proceedings	8/8/78
---	---	Transcript of proceedings	8/9/78
---	---	Transcript of proceedings	8/10/78
---	---	Transcript of proceedings	8/11/78
321	---	Findings of fact and conclusions of law	3/14/80
327	339	Judgment	7/9/80
---	---	Notice of cross appeal	8/6/80

In the United States Court of Appeals
for the Ninth Circuit

Defendants' reply brief, page 25 ¶16	9/25/81
Opinion and Judgment reported at 685 F.2d 1065 (9th Cir. 1982)	9/3/82

(Pursuant to Sup.Ct.R. 30.1, the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit has not been reproduced in this Joint Appendix. The Opinion and Judgment is reproduced fully at 1a - 16a of the Appendices in the Petition for Writ of Certiorari.)

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COMPLAINT AMENDED:
1st date: 3-20-73
2nd date:
3rd date:
4th date:

FILED
MAR 20 1973
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY E. Lindsley DEPUTY

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, PAMELA BALIAN, RAY SAULS, NANCY DEAN, PHYLLIS PAYNE, NOEL FONTAINE, SALLY LOUDIN Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES SYSTEM BOARD OF ADJUSTMENT NO. 451, AIR TRANSPORT DIVISION; CALIFORNIA STATE LEGISLATIVE COMMITTEE of the BROTHERHOOD OF RAILWAY,	No. 73-113-N COMPLAINT FOR JUDGMENT, MONETARY DAMAGES AND INJUNCTIVE RELIEF

AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; SKYLINER LODGE LOCAL 3001; SKYHARBOR LODGE LOCAL 3014; and ARROWLINER LODGE LOCAL 3049,

Defendants.

1. This Court has jurisdiction over this matter by virtue of Title 28, United States Code, §1337, and Title 45, United States Code, § 151 et seq. The questions presented herein arise under the Constitution and laws of the United States.

2. Plaintiffs are citizens of the United States, residents of California, and are employed by Western Air Lines, Inc. (hereinafter "Western") at San Diego, Los Angeles and San Francisco, California.

3. Defendants Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; and its subsidiary organizations System Board of Adjustment No. 451, Air Transport Division, Skyliner Lodge Local 3001, Skyharbor Lodge Local 3014 and Arrowliner Lodge Local 3049 (hereinafter collectively referred to as "BRAC") are unincorporated associations and labor organizations whose purpose, in part, is the representation of employees for collective bargaining over wages, hours, and working conditions within the meaning of Section Two of the Railway Labor Act, 45 U.S.C., § 151 et seq.

4. Defendant California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter "the Committee") is an unincorporated association, subsidiary to and affiliated with BRAC, which has as its purpose, in part, the sponsorship of political candidates, causes and legislation in the State of California, and these activities are supported financially by a substantial amount of funds derived from the compulsory dues and fees exacted from plaintiffs.

5. Western Air Lines, Inc. is a corporation authorized to and doing business in the State of California, engaged in the transportation of passengers and freight in interstate commerce.

6. At all times material hereto, Western has maintained a collective bargaining relationship with BRAC governing the terms and conditions

of employment of plaintiffs as described below. BRAC was and is the exclusive bargaining agent for the craft or class of employees in which plaintiffs are employed.

7. The collective bargaining agreement applicable at all times pertinent hereto includes a provision executed by BRAC and Western on October 27, 1966 making union membership obligatory for all new employees, and requiring BRAC members to maintain their membership. A copy of this provision is attached hereto, marked Exhibit A, and incorporated herein by reference.

8. Under the terms of the aforesaid agreement employees hired prior to October 27, 1966 were not required to join BRAC or make payments to it. However, by a separate letter agreement of that date, Western agreed to compel such employees to join BRAC at such time as BRAC was able to demonstrate a membership level of 85% of the bargaining unit. By a letter agreement of February 26, 1971, BRAC and Western implemented and modified the October 27, 1966 agreement. Those agreements are attached hereto, respectively marked Exhibit B and Exhibit C, and incorporated herein by reference.

9. The agreements compelling union membership or the payment of initiation fees and dues, referred to in paragraphs 7 and 8 above, are hereinafter collectively referred to as the "compulsory union membership agreement."

10. By letters of March 1, 1971 and March 4, 1971, plaintiffs were advised by BRAC and Western that their employment with Western would be terminated if they refused to pay BRAC an initiation fee and monthly dues. Examples of those letters are attached hereto, respectively marked Exhibit D and Exhibit E, and incorporated herein by reference.

11. By the terms of the compulsory union membership agreement and other provisions of the collective bargaining agreement, Western has obligated itself to enforce such provisions against employees declining to pay union dues and fees, by threatening or effecting their termination. Plaintiffs have been advised by responsible representatives of Western and BRAC that they will be similarly discharged from employment if they fail or refuse to pay the BRAC initiation fees and dues.

12. Plaintiffs have declined to sign applications for membership in BRAC but have, under the obligation imposed upon them by the

compulsory union membership agreement, paid and continue to pay agency shop fees in amounts equivalent to the required BRAC initiation fees and monthly membership dues. Plaintiffs' payment of dues and fees to BRAC is involuntary, and is done solely because of the duress and coercion exerted by threatened termination of their employment.

13. Plaintiffs have each advised BRAC of his or her specific objection to the exaction of dues for political purposes and for all other purposes not directly related to collective bargaining. Such objections were stated in substantially the following form:

> As an employee of Western Air Lines, I feel that the Brotherhood of Railway, Airline and Steamship Clerks does not properly represent my interests and I protest the compulsory "agency fee" I must pay the Brotherhood of Railway, Airline and Steamship Clerks, in order to retain my job. In addition, I hereby protest the use of these fees for any purpose other than the cost of collective bargaining and specifically protest the support of legislative goals, candidates for political office, political efforts of any kind or nature, ideological causes, and any other activity which is not a direct cost of collective bargaining on my behalf. I demand an accounting and refund from the Brotherhood of Railway, Airline and Steamship Clerks of all fees exacted from me by the so-called "agency fee".

Count I

14. Plaintiffs reiterate and reallege all of the allegations set forth in paragraphs 1 through 13 above.

15. The compulsory dues and fees exacted from plaintiffs under the aforesaid compulsory union membership agreement have been used and are being used in substantial amounts by BRAC and the Committee over the objections of plaintiffs for the following illegal and improper purposes:

> (A). To support by direct and indirect financial contributions and expenditures the political campaigns of candidates for public office, including the offices of President and Vice-President of the United States, the Senate and House of Representatives of the United States, and various state and local

offices; many, if not all, of such candidates being opposed by plaintiffs.

(B). To propagate political and economic doctrines, concepts, idelogies [*sic*], and legislative programs which are opposed by plaintiffs, thereby imposing upon them conformity to those doctrines, concepts, ideologies and programs.

(C). To cover the cost of publications, convention expenses, strike benefits, contributions to organizations and individuals, recreational activities, a death benefit plan, and various other programs.

The foregoing expenditures are not reasonably necessary to the negotiation and administration of collective bargaining agreements, or the adjustment and settlement of grievances and disputes, nor are they necessary or germane to the representation of plaintiffs. Such expenditures have been accompanied by BRAC's use of its officers, employees, representatives and facilities, with attendant expense, to support or oppose particular candidates or legislation, and to conduct voter registration drives and "get out the vote" campaigns among persons thought to be favorably inclined to BRAC sponsored or endorsed candidates.

16. The exaction of dues and fees from plaintiffs under threatened loss of their employment, and the use of such payments for the purposes stated above, imposes upon them political and ideological conformity, prevents them from exercising their rights and privileges as citizens of the United States, deprives them of their civil rights guaranteed to them under statutes of the United States, injures them in their persons and property, and abridges rights guaranteed to them under the First, Fifth and Ninth Amendments of the United States Constitution; which Amendments guarantee to individuals freedom of association, freedom of thought, freedom of speech, freedom of political action, freedom to pursue the occupations of their choice, freedom from unwarranted invasion of their privacy, and other fundamental personal rights and liberties.

17. The aforesaid deprivation and abridgement of the statutory and constitutional rights of plaintiffs is accomplished by BRAC through its collective bargaining agreement with Western, acting under authority of the Railway Labor Act, 45 U.S.C., § 151, et seq. The Railway Labor Act authorizes the designation of BRAC as exclusive bargaining agent for all

employees in the collective bargaining unit in which plaintiffs are employed, and empowers BRAC and Western to enter into the form of compulsory union membership agreement described above.

Count II

18. Plaintiffs reiterate and reallege all of the allegations of paragraphs 1 through 13 and 15 through 17.

19. As the statutory exclusive bargaining representative of plaintiffs BRAC owes each of them the fiduciary duty of fair representation, but has wilfully and persistently breached this duty, and breached an implied condition of the collective bargaining agreement by expending a substantial portion of their dues and fees for purposes not reasonably related to the negotiation and administration of collective agreements nor to the adjustment and settlement of grievances and disputes. Such expenditures are not in furtherance of BRAC's legitimate objectives and obligations as collective bargaining representatives of plaintiffs and BRAC's continuing diversion and conversion of their funds is arbitrary, in bad faith, and constitutes hostile discrimination against plaintiffs.

Count III

20. Plaintiffs reiterate and reallege all of the allegations of paragraphs 1 through 13, 15 through 17, and 19.

21. BRAC has established an internal procedure whereby persons who object to use of their monthly dues for political purposes may register that objection and reduce the amount of monthly dues payments. This provision is set forth in Article 27 of the BRAC Constitution, and has existed in substantially the following form at all times material hereto:

> Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one third cents (3 1/3 c) per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the Financial Secretary, in writing, and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

22. BRAC has arbitrarily, in bad faith, and with hostile discrimination denied participation in this procedure to plaintiffs. BRAC has breached its fiduciary duty by refusing to extend or apply the dues reduction provision to plaintiffs, who have declined formal union membership, but remain under the obligation to pay agency fees and dues in amounts equivalent to BRAC initiation fees and monthly membership dues.

23. The dues reduction procedure set forth in paragraph 21, even if it were available to plaintiffs, is illegal, arbitrary, and discriminatory in its structure and operation for the following reasons:

(A). It provides for no reduction of the initiation fees, yet plaintiffs aver upon knowledge and belief that a substantial amount of revenue BRAC derives from such fees is used for political and ideological purposes.

(B). The amount of dues reduction (3 1/3 cents per month) is patently unrelated to the extent of prohibited expenditures. Two examples follow:

1. Article 27, Section 4(a) of the BRAC Constitution provides that 3 1/3 cents per month from each member's dues shall be applied to the "Legislative Fund Account (Grand Lodge)."

2. Article 23, Section 4(b) of the BRAC Constitution authorizes each State Legislative Committee to levy against each member in the state a levy "*of not less than thirty cents*" per month for "the transaction of its business." (Emphasis Added). This amount is paid from each member's monthly dues. Such levies are made against plaintiffs.

(C). No procedure is afforded by which dissenters such as plaintiffs may ascertain the true relationship between prohibited spending and the miniscule amount of the dues reduction.

(D). Plaintiffs are informed and believe, and therefore aver, that amounts of money expended by BRAC for political and ideological purposes and other purposes not germane to

collective bargaining are greatly in excess of the amount by which a dues reduction may be allowed under the aforesaid procedure.

CONCLUSION

Plaintiffs have no adequate remedy at law for the harm and damage resulting from the acts and conduct of defendants, as hereinabove alleged, because of their prospective loss of their employment, the loss of their seniority rights, the loss of diminution of their respective trade skills during any prolonged period away from their jobs and because they are and will be deprived of their liberty and property without due process of law in violation of their rights under the First, Fifth and Ninth Amendments of the United States Constitution. Irreparable harm, damage and injury will be done to plaintiffs unless the acts and conduct of defendants above complained of are permanently enjoined.

WHEREFORE, plaintiffs pray:

1. For a declaratory judgment holding that the herein described compulsory union membership agreement in its operation and effect denies and abridges plaintiffs' constitutional and statutory rights.

2. For an order requiring BRAC to account to plaintiffs for all sums exacted from them pursuant to the above-mentioned collective bargaining agreement; to account in detail for the allocation, expenditure and disposition of said funds; to include in said accounting the identity of the recipients, corporate, associate, partnership, individual or otherwise, as the case may be, of said funds.

3. For a permanent injunction restraining BRAC from enforcing as against plaintiffs the compulsory union membership agreement provisions of the collective bargaining agreement described herein, insofar as such provisions are used to compel payment for purposes unrelated to the negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes.

4. That the Court enter an order requiring BRAC to make available to plaintiffs any procedure adopted for the refund or reduction of membership dues and fees in response to a protest against their expenditure for political purposes, or for other purposes not related to

collective bargaining. Further, that defendant BRAC be required to establish a procedure for an accurate correlation of the dues reduction or refund to amounts actually expended by it for purposes unrelated to collective bargaining or the settlement of disputes; and if a refund procedure is utilized, that it ensure prompt return of such funds.

5. For a judgment allowing plaintiffs monetary damages for injuries sustained as a result of defendants' unlawful and unwarranted interference with and deprivation of their constitutional, civil, statutory and contractual rights.

6. For attorneys' fees, costs, and for such other and further relief as the Court may deem just and proper.

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

By _____
Michael E. Merrill

By _____
Raymond J. LaJeunesse, Jr.

GIBSON & KENNERSON

By _____
Jonathan C. Gibson

GALL, LANE, POWELL & KILCULLEN

By _____
John L. Kilcullen

Attorneys for Plaintiffs

EXHIBIT A

This Agreement is made by and between Western Air Lines, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, in accordance with the provisions of the Railway Labor Act, as amended.

(1) Each employee in a classification under the basic Agreement who is a member of the Union on the effective date hereof and each such employee who becomes a member after such date, shall, as a condition of employment, maintain membership in good standing in the Union.

(2) Each employee hired in a job classification under this Agreement after the effective date hereof shall, after completion of his/her sixtieth (60th) day of employment, acquire and maintain membership in the Union.

(3) Membership in the Union means the employee has tendered payment of initiation fees and regular monthly dues uniformly required by the applicable constitutional provisions of the Union for employees of like status and in accordance with the Railway Labor Act, as amended.

(4) It is understood and agreed that the requirements of Paragraphs (1) and (2) do not apply to employees to who membership is not available under the same terms and conditions as are generally applicable to other employees of like status.

(5) Employees required under this Agreement to maintain membership in the Union who are transferred or assigned to job classifications outside the basic Agreement, employees on leave of absence without pay for a period of excess of thirty (30) days, and employees on furlough shall not, during such periods, be required to maintain membership in the Union provided, however, upon return from leave, furlough or assignment or transfer to a job classification under the basic Agreement such employee must reinstate his membership within thirty (30) days.

(6) Employees required under this Agreement to acquire and/or maintain membership in the Union and who fail therein are subject to termination in accordance with the following provisions:

a. The General Chairman will notify the employee in writing of his failure to comply with the provisions of this Agreement and afford to such employee the opportunity to comply, or if he disputes the charge that he has failed to comply, he shall be given the opportunity of a hearing with the General Chairman to verify the applicable facts.

b. If the facts show the employee has not complied with this Agreement and the employee has not, within fifteen (15) days thereafter, taken steps to comply, the General Chairman may notify the Company in writing that such employee is not entitled to continue in employment. Such notice should be sent to the Director-Labor Relations, with a copy to the employee.

c. Upon receipt of such notice, the Company will, within five (5) days, send to the employee a notice of termination which shall become effective three (3) weeks from the date of mailing, subject to Paragraph (8) hereof.

d. If the employee disputes the charge of noncompliance, he may appeal directly to the Director-Labor Relations. In this event, a hearing shall be held in the same manner as any other grievance and all time limits for decision and appeal shall apply.

e. It is understood and agreed that (1) the Company will not send a termination notice as sent forth in Paragraph (6)c in a disputed case until a final decision has been reached, and (2) at any time prior to termination, the employee may tender the necessary dues and/or initiation fees.

(7) An employee terminated at the request of the General Chairman under this Agreement shall be deemed to have been discharged for cause and the Company shall not be liable for any wages or pay claims of any type from such employee. In the event of a court judgment to the effect the discharge was improper, the Union hereby agrees to hold the Company harmless and will reimburse the Company for any costs whatsoever involved.

(8) In any event, it is agreed the Company will not be required to terminate any employee under this Agreement until the services of a qualified replacement is available.

(9) The Company agrees that upon receipt of a properly executed Authorization for Payroll Deduction, it will make a single monthly deduction from an employee's earnings, after other deductions authorized by the employee or required by law have been made, to cover his current standard monthly Union dues uniformly levied in accordance with the constitution and by-laws of the Union, as set forth in the Railway Labor Act.

(10) Any Authorization for Payroll Deductions under this Letter of Agreement shall be effective two (2) weeks following its receipt by the Company's Payroll Department at the Company's General Office in Los Angeles, and shall apply to the next pay check from which dues deduction is made.

(11) The Company will remit to the designated Union office a check in payment of all dues collected as soon as practicable after the payday on which deductions were made.

(12) Collection of back dues, dues not deducted because of insufficient current earnings, dues missed because of clerical error or dues missed due to delay in receipt of the Authorization for Payroll Deductions shall be the responsibility of the Union and not subject to payroll deduction.

(13) In the event the amount of the standard dues uniformly levied are changed, it shall be the sole responsibility of the employee and the Union to notify the Company and to make any necessary adjustments between themselves of amounts deducted from the employee's earnings. So far as the Company is concerned, any such changes shall be made in accordance with the time limits set forth in Paragraph (10) of this Letter of Agreement.

(14) An Authorization for Payroll Deduction under this Letter of Agreement once executed and delivered to the Company shall be irrevocable for the term of the basic Agreement or for a period of one (1) year, whichever is the lesser, and shall renew itself for successive yearly or applicable periods thereafter unless the employee serves written notice on the Company to revoke such Authorization for Payroll Deduction at least sixty (60) days and not more than seventy-five (75) days prior to any periodic renewal date, provided, however, an Authorization for Payroll Deduction shall automatically be revoked if:

a. The employee transfers to a position with the Company not covered by the basic Agreement between the parties.

b. The employee's services with the Company are terminated.

c. The Union ceases to represent the employees covered under this Agreement.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement this 27th day of October, 1966.

FOR THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERDS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES	FOR WESTERN AIR LINES, INC.
/s/ Lyle McKinney	/s/ Terrell S. Shrader
/s/ Richard R. Calkins	/S/ Philip E. Peirce
/s/ Robert L. Dennis	/s/ Dan A. Zaich

EXHIBIT B

WESTERN AIR LINES, INC.
LOS ANGELES INTERNATIONAL AIRPORT
6060 AVION DRIVE
LOS ANGELES, CALIFORNIA 90009

OFFICE OF THE VICE PRESIDENT
INDUSTRIAL RELATIONS

October 27, 1966

Mr. Lyle McKinney
General Chairman
Brotherhood of Railway Clerks
Suite 526, Airport Office Building
8939 South Sepulveda Boulevard
Los Angeles, California 90045

Dear Mr. McKinney;

This will confirm to you my commitment to grant to the employees as represented by the Air Transport Division of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees a Union Shop Agreement upon request and a showing that at least 85% of the employees covered are members in good standing.

Very truly yours,

/s/
TERRELL S. SHRADER

TSS:lm

MEMORANDUM NO. 7

EXHIBIT C

LETTER OF AGREEMENT

This Letter of Agreement is made and entered into by and between Western Air Lines and the Brotherhood of Railway and Airline Clerks.

The parties hereto agreed as follows:

(1) Paragraph (1) of the Letter of Agreement dated October 27, 1966 will be amended to read as follows:

> "Each employee in a classification under the basic agreement will be required to acquire and maintain membership in the Union except that each employee hired prior to October 27, 1966 who desires to maintain employment with Western but does not desire membership in the Union may, instead of acquiring membership, tender to the Union a service charge equal to the initiation fee and monthly dues that uniformly imposed on Union members."

(2) Employees who fail to meet the provisions of Paragraph (1) of this Letter of Agreement within sixty (60) days of the date of this letter are subject to termination in accordance with the provisions of the Letter of Agreement dated October 27, 1966.

This Letter of Agreement is signed this 26th day of February, 1971.

FOR THE BROTHERHOOD OF
RAILWAY AND AIRLINE CLERKS

FOR WESTERN AIR LINES, INC.

APPROVED BY:

EXHIBIT D

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
AFL—CIO—CLC SYSTEM BOARD OF ADJUSTMENT NO. 451

AIR TRANSPORT DIVISION

WILLIAM H. GRANT General Chairman
ROBERT L. DENNIS Vice General Chairman
CAROLINE K. SEEL General Secretary-Treasurer

March 1, 1971

Dear Non-Members - Western Airlines:

On February 26, 1971, BRAC and Western Airlines entered into Agreement whereby each employee in a classification under the basic agreements will be required to obtain and maintain membership in the Union, except that each employee hired prior to October 27, 1966 who desires to maintain employment with Western, but does not desire membership in the Union may, instead of acquiring membership, tender to the Union a service charge equal to the initiation fee and monthly dues which are uniformly imposed on Union members.

Employees who fail to meet the provisions of this Agreement within 60 days from the date of signing of said Agreement, are subject to termination in accordance with the provisions of the Letter of Agreement dated October 27, 1966.

The purpose of this letter is to make it convenient for you to fulfill your obligation to join the Union. Please be advised that you should tender the initiation fee of $10.00 and one month's dues of $6.50. In the event that you were a member of the Union prior to October 27, 1966, you should instead, tender a reinstatement fee of $15.00 and one month's dues of $6.50.

We are enclosing for your convenience, an application for membership and dues check-off form which should be completed by you and returned to us with the fees before April 27, 1971.

Very truly yours,

William H. Grant
General Chairman

EXHIBIT E

Western Airlines

March 4, 1971

TO WHOM IT MAY CONCERN:

In October of 1966, the Company and the BRAC signed a Maintenance of Membership Agreement which provided that any employee who at that time was a member of the Union or who was hired after 10/27/66 would be required to acquire and maintain membership. In addition, the Company agreed that at such time as 85% of the employees covered by the Agreement became members of the Union, the remaining 15% would be required to become members. As of 2/22/71, 85% of the employees covered by the Agreement are Union members.

This letter is to advise you that you are now subject to a Letter of Agreement signed on 2/26/71 which provides that you will be required to acquire and maintain membership in the Union; however, if you do not desire membership you may instead tender to the Union a service charge equal to the initiation fee and monthly dues that are uniformly imposed on Union members. This obligation must be met within 60 days (by April 26) or you will be subject to termination in accordance with the provisions of the Letter of Agreement dated 10/27/66. Within the next few days the Union will be contacting you directly concerning this obligation.

D. S. Neel, Jr.
Vice President, Service (Line)

BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
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CLERK, U. S. DISTRICT COURT
SOUTHERN DIST. OF CALIFORNIA
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, PAMELA BALIAN, RAY SAULS, NANCY DEAN, PHYLLIS PAYNE, NOEL FONTAINE, SALLY LOUDIN, Plaintiffs, vs. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES SYSTEM BOARD OF ADJUSTMENT NO. 451, AIR TRANSPORT DIVISION; CALIFORNIA STATE LEGISLATIVE COMMITTEE of the BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION	CIVIL NO. 73-113-N FIRST AMENDED ANSWER TO COMPLAINT

EMPLOYEES; SKYLINER LODGE LOCAL 3001; SKYHARBOR LODGE LOCAL 3014; and ARROWLINER LODGE LOCAL 3049,

Defendants.

Defendants BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES SYSTEM BOARD OF ADJUSTMENT NO. 451, AIR TRANSPORT DIVISION; CALIFORNIA STATE LEGISLATIVE COMMITTEE OF THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; SKYLINER LODGE LOCAL 3001; SKYHARBOR LODGE LOCAL 3014; and ARROWLINER LODGE LOCAL 3049 (hereinafter collective referred to as "BRAC"), for answer to the Complaint on file herein, admit, deny and allege as follows:

1. In answer to the allegations of paragraph 1, defendants deny each and every allegation contained in said paragraph.

2. In answer to the allegations of paragraphs 2 and 3, defendants admit each and every such allegation.

3. In answer to the allegations of paragraph 4, defendants admit that the California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes is an unincorporated association, subsidiary to and affiliated with the BRAC, that the Committee sponsors political candidates, causes and legislation in the state of California, and that these activities are supported financially by thirty cents per member per month derived from the compulsory dues and fees paid by plaintiffs and others. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 4.

4. In answer to the allegations of paragraphs 5 and 6, defendants admit each and every allegation.

5. In answer to the allegations of paragraphs 7 and 8, defendants

admit that the agreements attached to the complaint as Exhibits A, B, and C are agreements executed by BRAC and Western and that said agreements set forth terms and conditions relating to the obligations of employees with respect to BRAC. Except as expressly admitted, defendants deny each and every allegation of paragraphs 7 and 8.

6. In answer to the allegations of paragraph 9, defendants admit that plaintiffs refer in their complaint to the union security provisions of the collective bargaining agreement as "compulsory union membership agreement."

7. In answer to the allegations of paragraph 10, defendants admit that plaintiffs were advised by BRAC by letters of March 1, 1971, that their employment with Western would be terminated if they refused to pay BRAC an initiation fee and monthly dues and that examples of those letters are attached to the complaint and marked Exhibit D. Except as otherwise expressly admitted, defendants allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 10, and, placing their denial on that ground, deny each and every such allegation.

8. In answer to the allegations of paragraph 11, defendants admit said allegations.

9. In answer to the allegations of paragraph 12, defendants admit that plaintiffs have declined to sign applications for membership in BRAC, that plaintiffs have paid agency shop fees in amounts equivalent to the required BRAC initiation fees and monthly membership dues, and that plaintiffs Balian, Dean, Payne, Fontaine, and Loudin continue to pay agency shop fees in amounts equivalent to the required BRAC initiation fees and monthly membership dues. Defendants deny that plaintiffs Ellis and Sauls continue to pay the agency shop fees in amounts equivalent to the required BRAC initiation fees and monthly membership dues. In answer to the allegations of the second sentence of paragraph 12, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations and, placing their denial on that ground, deny each and every such allegation.

10. In answer to the allegations of paragraph 13, defendants admit that plaintiffs Balian, Sauls, Dean, Payne, and Fontaine have mailed letters to BRAC substantially in the form quoted in paragraph 13. Except as

otherwise expressly admitted, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 and, placing their denial on that ground, deny each and every such allegation.

COUNT I

11. In answer to the allegations incorporated by reference in paragraph 14, defendants incorporate herein by reference each and every admission, denial and allegation of paragraphs 1 through 10 above.

12. In answer to the allegations of paragraph 15, defendants admit that dues and fees monies have been used in part for the activities described in sub-paragraph (c). Except as otherwise specifically admitted, defendants deny each and every allegation contained in paragraph 15.

13. In answer to the allegations of paragraph 16, defendants deny each and every such allegation.

14. In answer to the allegations of paragraph 17, defendants admit that the Railway Labor Act authorizes the designation of BRAC as exclusive bargaining agent for all employees in the collective bargaining unit in which plaintiffs are employed and empowers BRAC and Western to enter into the form of union security agreement described in paragraphs 7 and 8 of the complaint. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 17.

COUNT II

15. In answer to the allegations incorporated by reference in paragraph 18, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 10 and 12 through 14 above.

16. In answer to the allegations of paragraph 19, defendants admit that, as the statutory exclusive bargaining representative of plaintiffs, BRAC owes each of them the fiduciary duty of fair representation. Except as otherwise expressly admitted, defendants deny each and every

allegation contained in paragraph 19.

COUNT III

17. In answer to the allegations incorporated in paragraph 20, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 10, 12 through 14 and 16 above.

18. In answer to the allegations of paragraph 21, defendants admit said allegations.

19. In answer to the allegations of paragraph 22, defendants deny each and every such allegation.

20. In answer to the allegations of paragraph 23, defendants admit that the dues reduction procedure set forth in paragraph 21 provides for no reduction of the initiation fees, that Article 27, Section 4(a) of the BRAC constitution provides that three and one-third cents per month from each member's dues shall be applied to the Legislative Fund Account (Grand Lodge), and that Article 23, Section 4(b) of the BRAC constitution authorizes each State Legislative Committee to levy against each member in the state a levy of not less than thirty cents per month for the transaction of its business, and that this amount is paid from each member's monthly dues. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 23.

21. In answer to the allegations of the Conclusion, defendants deny each and every such allegation.

AS AND FOR THEIR FIRST AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

22. The Complaint fails to state a claim upon which relief can be granted in Count I, Count II, or Count III, or any of them.

AS AND FOR THEIR SECOND AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

23. Plaintiffs have failed to attempt to exhaust internal and administrative remedies available to them.

AS AND FOR THEIR THIRD AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

24. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 337, subdivision (1).

AS AND FOR THEIR FOURTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

25. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 338, subdivision (1).

AS AND FOR THEIR FIFTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

26. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 343.

AS AND FOR THEIR SIXTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

27. Insofar as the Complaint and Counts I, II, and III, and each of them, allege a claim arising out of the interpretation or application of the collective bargaining agreement between BRAC and Western Air Lines, said Complaint and Counts I, II, III, and each of them, are preempted by the provisions of the Railway Labor Act, 45 U.S.C., Section 184, and within the exclusive jurisdiction of the System Board of Adjustment.

WHEREFORE, defendants pray:

(1) That plaintiffs, and each of them, take nothing by their action;

(2) For costs of suit incurred herein; and

(3) For such other and further relief as the Court deems just and proper.

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STEPHEN REINHARDT
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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al. Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, etc., et al. Defendants.	Civil No. 73-113-N AMENDMENT TO COMPLAINT

Plaintiffs hereby move to amend their complaint herein as follows:

Count IV

24. Plaintiffs reiterate and reallege all of the allegations of Paragraphs 1 through 13, 15 through 17, 19, and 21 through 23.

25. At its quadrennial convention in 1967, Defendant BRAC first adopted an ostensible dues reduction procedure, by means of a constitutional amendment. That constitutional amendment is attached hereto, marked Exhibit F, and incorporated herein by reference.

26. At its quadrennial convention in 1971, Defendant BRAC revised that dues reduction procedure, again by means of a constitutional amendment, which is attached hereto, marked Exhibit G, and incorporated herein by reference. As revised, that provision is attached hereto, marked Exhibit H, and incorporated herein by reference.

27. Under Article 34, Section 1 of the BRAC Constitution, a constitutional amendment may be accomplished only at a convention, or by a referendum.

28. Flouting the requirements imposed by the constitution of the BRAC, its International President issued a Policy Statement (attached hereto, marked Exhibit I and made a part hereof by reference) which is in fact an amendment of the BRAC Constitution by executive fiat. Such action is specifically forbidden by numerous portions of the constitution, including the following:

> Article 13, detailing the International President's duties, specifies in Section 2 that he shall ". . . *enforce strict observance of the constitution*, laws, rules and regulations of the Brotherhood."
>
> Article 13, Section 3 emphasizes this duty, providing that the International President ". . . shall at all times strictly enforce the Grand Lodge Constitution, Statutes, for the Government of Lodges, Protective Laws and T. C. Division By-Laws of the Brotherhood and shall call to account any member or members of the Brotherhood violating the same."
>
> Article 13, Section 4 authorizes the International President to interpret the Constitution and laws, but limits this authority by stating that he may ". . . issue dispensation not *inconsistent with said Constitution* and laws."
>
> Article 5, Section 2 (a) provides that: "It is the obligation and responsibility of every officer, subordinate unit and member to comply with the Constitution, . . . and the orders of its proper officers *when in conformity therewith*; . . . ."
> (Emphasis supplied in the foregoing quotations).

29. The action undertaken in issuance of the Policy Statement was motivated by a fraudulent, deceitful and dishonest attempt to accomplish two objectives: (1) to conceal the nature and extent of BRAC's actual expenditure of the plaintiffs' compulsory union dues and fees, and (2) to enmesh the plaintiffs in an illusory scheme to bilk them of their right not to pay dues and fees for purposes unrelated to the negotiation and administration of collective bargaining agreements, or for the settlement of disputes and grievances.

30. One indication of defendants' motives, as evidenced in the International President's issuance of the Policy Statement, appears in the fact that plaintiffs propounded interrogatories on January 21, 1974 which sought details on defendants' spending of dues and fees; on January 24, 1974 the Policy Statement was issued with a retroactive effective date, and officers and representatives of defendants were told by International President Dennis that "It is imperative that prompt action be taken on this matter. . . ;" and that "This matter should take precedence over any other duty you may hve. . . ." These instructions are contained in letters to his subordinate officers.

31. The Policy Statement is inconsistent with the constitutional provisions of Article 27 (Exhibit H), and therefore is an invalid exercise, for many reasons, including but not limited to the amount of dues reduction, the procedure whereby it may be obtained, the persons authorized by BRAC to administer it, and the categories of employees represented by the union to whom it is applicable.

32. On its face, and in its operation and effect as described by International President Dennis, the Policy Statement is arbitrary, capricious, deceptive and invidiously discriminatory for the following reasons:

A. It applies to only a limited portion of defendants' improper expenditures of plaintiffs' dues and fees.

B. On its face, it does not encompass payments plaintiffs are compelled to make in the form of initiation fees and assessments.

C. It discriminates against all members and agency fee payers who decline to execute a checkoff, in that no method is specified as to how or when they are supposed to be able to obtain a refund; and International President Dennis has stated that such procedures are not yet established, and further that they will vary from one

Local Lodge and employee group to another, depending upon the arrangements he makes with the Local Lodge officers, the form of the collective bargaining agreement under which the affected employees work, and other factors.

D. Objectors are not provided with any means to secure information by which they may refute or authenticate the determination by various BRAC officials of the amount of political spending, or other data pertinent to the operation of the Policy Statement; and International President Dennis has stated that BRAC will refuse to provide such information, even on the various levels of appeals specified.

E. The initial determination of the amount of improper spending and the review thereof at the first two appellate levels is made by those persons having a vested interest in computing it at a minimum level; those same persons actively participate in the selection of recipients and beneficiaries of improper expenditures from plaintiffs' dues and fees.

F. The International President has demonstrated hostility toward members and agency payers exercising their right to become objectors. Further, he cannot serve an impartial appellate function as he has stated that he does and will work closely with the Board of Trustees in making their initial dues reduction computation. Further, he has a conflict of interest in serving in an appellate capacity or in any way affecting the dues reduction determinations, as he is President of the Railway Clerks Political League, a political organization which is the recipient or beneficiary of a substantial amount of contributions, services, supplies, and equipment from BRAC, for which the payment or cost thereof is derived at least in part from objectors' (including plaintiffs') compulsory dues and fees. The International President therefore has a vested interest in ensuring that such contributions and services are provided at a maximum level. This conflict is intensified by the fact that 6 of the 7 members of the Railway Clerks Political League Executive Committee are members of the BRAC Executive Council, which is the second step appellate forum.

G. At the final appellate level, those persons serving the Appeals Committee of the convention are appointed by BRAC's International President, (who decided step one of the appeal) with the ratification of the convention.

H. There is no way to determine the amount of time plaintiffs would be required to expend in pursuit of the illusory appellate procedures, as:
   (1) no time limitations are provided in the Policy Statement,
   (2) even if other appeal procedures set forth in the constitution were followed, there is no time limit within which the International President or the Executive Council must render a decision.
   (3) conventions are scheduled four years apart.

I. Plaintiffs may not be represented on appeal by an attorney, unless such an attorney is a BRAC member, and International President Dennis has revealed that there are only approximately 15-25 of such attorneys in the entire United States who do not serve in a representative capacity for the union, which has approximately 200,000 members in the United States.

J. There are no procedural rules or provisions applicable to establish how they may accomplish an appeal under the Policy Statement, or specifying how they may present such an appeal. The only provisions which might govern such matters are set forth in the BRAC Constitution, and they are limited to those who have executed applications for membership.

K. The Policy Statement intentionally imposes burdensome and illogical conditions upon potential objectors to chill their exercise of their right to object to improper use of their compulsory dues and fees, and to cause those who do object to suffer a net economic loss:
   (1) Although BRAC is making known the very existence of the Policy Statement by its newspaper (second class mail) and by regular mail in some cases, objectors must incur the expense of mailing their objection by registered or certified mail.
   (2) Objectors must bear the expense of making an individual notification of their objection.
   (3) Those who have in the past objected, and defendants concede having received objections from some plaintiffs and others, must send a new request via certified or registered mail in order to validate their prior objection.
   (4) Defendants require objectors to make an annual renewal of their objection, by certified or registered mail.

(5) While the Policy Statement purports to grant prior objectors 90 days within which they must renew their objections, that period begins from the effective date, January 1, 1974. The Policy Statement was not issued until January 24, 1974, notification to agency fee payers was not initiated until February 14, 1974 or later, and notification to members through the union newspaper was not begun until February 27, 1974. Thus the vast number of persons subject to the Policy Statement will have less than 30 days notice, rather than the 90 days.

L. In order to present an appeal, the objector must travel to Chicago, Illinois, headquarters of the International President, and to whatever distant city has been selected for an Executive Council meeting or a convention. All expenses incurred by the objector, including attorneys' fees (in the unlikely event he found a BRAC member-attorney willing to represent him, and acceptable to the objector), travel expenses, and costs incurred in establishing his evidence of the improper determination below must be borne by the objector, even if he succeeds in his appeal.

M. The Policy Statement invidiously discriminates against agency payers by permitting members only to object within their first 30 days of membership. Agency payers' objections are not deemed timely until the first 30 days of the calendar year following the inception of the compulsory union dues and fees payments.

33. Issuance of the Policy Statement is the latest example of defendants' continuing bad faith effort to oppress employees they represent, and to stifle them in the exercise of rights guaranteed them in the First, Fifth and Ninth Amendments to the United States Constitution and by the Railway Labor Act, 45 U.S.C. § 151 *et seq*. Those rights preclude defendants from compelling plaintiffs to pay dues and fees for purposes other than the negotiation and administration of collective bargaining agreements, and for the adjustment and settlement of grievances and disputes.

34. Defendants' bad faith is further exemplified by the pendency of the within action for approximately one year, during which time defendants have continued their steadfast refusal to refund dues and fees improperly spent over plaintiffs' objection.

35. Irreparable harm, damage, and injury will be done to plaintiffs unless defendants are enjoined and restrained from subjecting plaintiffs to the provisions of the Policy Statement, as they will be denied their constitutional and statutory rights as above described. Plaintiffs have no adequate remedy at law for the harm, damage, and injury suffered as a consequence of the acts and conduct of defendants.

WHEREFORE, plaintiffs pray:

1. For an order determining that the adoption of the Policy Statement was invalid, and is void and of no effect;

2. That the Court enjoin and restrain defendants from subjecting plaintiffs and others represented by BRAC to the Policy Statement;

3. For an order releasing objectors from any obligation to paydues, fees, or assessments to defendants or any subordinate or affiliated organizations as a condition of employment;

4. For a judgment allowing plaintiffs and the class they represent monetary damages for injuries sustained as a result of defendants' unlawful and unwarranted interference with and deprivation of their constitutional, civil, statutory and contractual rights.

5. For attorneys' fees, costs, and for such other and further relief as the Court may deem just and proper.

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RAYMOND J. LAJEUNESSE, JR.
The National Right to Work
Legal Defense Foundation, Inc.

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By
Michael E. Merrill

Attorneys for Plaintiffs

(Proof of service omitted in printing.)

EXHIBIT F

EXCERPTS FROM THE PROCEEDINGS OF THE 23RD REGULAR AND 9TH QUADRENNIAL CONVENTION OF THE BRAC, MAY 1967

* * *

One additional point we wish to bring out before reading the report of the committee is that we have now made a provision in respect to dues for associate members who are classified as members who retire because of age and perform no compensated service in industry over which the Brotherhood claims jurisdiction. Such members' dues would be the voluntary payment of one dollar ($1.00) per month. A retired member's interest changes from that of an active service employe, his main gains are achieved through legislative changes, rather than collective bargaining. It is, therefore, just and proper that a portion of his dues be earmarked for political activities. We have been advised that in view of the voluntary payment of these dues the procedure we are recommending in this area fully complies with applicable Federal law.

You will also note that we have added a section that permits a full dues paying member who does not desire to contribute to the legislative fund account to reduce his dues by 2c per month. This recommendation is being offered as a result of court litigation involving union shop contracts and the decisions rendered in the involved cases raises some doubt as to the use of union funds for political-legislative purposes against the wishes of a member. For this reason, our financial officers have calculated that approximately 2c per member per month is used for these purposes. Therefore, we have provided that these members have opportunity to not participate in this area to this limited extent. It is inconceivable to this committee that a member would not desire to participate in this very important function of our Brotherhood. However, the avenue of nonparticipation will now be available if a member insists.

Since your committee prepared its report, additional resolutions involving dues have been submitted. These resolutions are herewith listed by number—543, 545, 551, 552, 553, 562, 563, 570 and 574. Your committee has reviewed these resolutions and feels that the statements previously made in this report need not be changed nor its proposals altered.

Attention is directed to change in system board per capita tax which also would be reflected in Article 1, Section 15 (a), pages 106 and 107 of

the Protective Laws. Your committee will make the appropriate changes when codifying the laws after the convention.

For the delegates' information, you have heard the report of the Finance Committee just recently in regard to the Grand Lodge assuming the full cost for LABOR newspaper, and we are just bringing that to your attention at this time.

Your Committee on Grand Lodge Constitution and Laws proposes to amend Article 27, Section 2 (a), Section 4 (d) appearing on pages 60, 61, 62, and 63 of the Constitution of the Grand Lodge as follows:

PROPOSED CHANGES

Fees and Dues

Section 2 (a) Effective July 1, 1967, all full dues established by the 1963 Convention, or by other provisions of the Constitution and laws of the Brotherhood applicable to all members under the jurisdiction of each board of adjustment, shall be increased one dollar ($1.00) per member per month, except that no full dues shall be less than five dollars and fifty cents ($5.50) per member per month.

There shall be two kinds of dues applicable to members of the Brotherhood. Full dues shall be not less than five dollars and fifty cents ($5.50) per member per month, of which a minimum of one dollar and thirty cents ($1.30) per member per month shall be retained for state legislative tax and the use of the use of the lodge; retention of membership dues which shall be one dollar ($1.00) per member per month, of which twenty-five cents (25c) shall be retained for the use of the lodge. Full dues shall apply to each member who received pay for forty (40) hours or more in any calendar month on a position in industry over which the Brotherhood claims jurisdiction, or the equivalent compensation under any agreement between an employer and the Brotherhood; to a member promoted to excepted or official positions and a member taking a voluntary leave of absence requiring approval of the organization. Each board of adjustment is authorized to fix uniform dues (above the minimum of five dollars and fifty cents ($5.50) per member per month) to apply to all members under the jurisdiction of the board, provided such dues shall be sufficient to meet Grand Lodge per capita tax, lawfully approved board of adjustment per capita tax and State Legislative Committee per capita

tax, subject to the approval of the International President.

Retention of membership dues shall apply to a member who performs no service in a calendar month due to reduction in force, furlough, military service, sickness, disability, resignation, and a member who receives pay for less than forty (40) hours in any calendar month on a position in industry over which the Brotherhood claims jurisdiction; and a member working in another craft in the industry where he is required to join another union under a union shop agreement.

Members who have retired because of age and who perform no compensated service on a position in industry over which the Brotherhood claims jurisdiction will be classified as associate members, with full rights to participate in the Death Benefit Department, if qualified, receipt of "The Railway Clerk," with right to attend lodge meetings of the Brotherhood, except they shall have no vote in the election of officers, or on matters pertaining to wages, rules, working conditions or grievances, and they may retain such membership by the voluntary payment of one dollar ($1.00) per month.

PROPOSED CHANGES

That Article 27, Section 4 (a) be amended to read as follows:

Per Capita Tax

Section 4 (a) Grand Lodge per capita tax shall be two dollars and ten cents ($2.10) per month or six dollars and thirty cents ($6.30) per quarter on full dues paying members, except that no per capita tax is payable on new or reinstated members for the quarter in which they apply for membership; seventy-five cents (75c) per month or two dollars and twenty-five cents ($2.25) per quarter on reduced dues paying members and shall be apportioned quarterly by the International Secretary-Treasurer to the different funds and fund accounts as follows:

Per Capita Tax on Full Dues Paying Members

General Fund Account (Grand Lodge) $3.45

Protective Fund Account (Grand Lodge) ..... .45

Convention Fund Account (Grand Lodge) ..... .24

Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
Organization Fund Account (Grand Lodge)	.30
*Legislative Fund Account (Grand Lodge)	.06
Total	$6.30

*Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced two cents (2c) per month by notifying the lodge secretary in writing and paying his dues directly to the lodge secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the lodge secretary in writing and cannot be retroactive. The lodge secretary will acknowledge receipt of notice.

Retention of Membership Per Capita Tax

General Fund Account (Grand Lodge)	$ .15
Convention Fund Account (Grand Lodge)	.24
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
*Legislative Fund Account (Grand Lodge)	.06
Total	$2.25

*Any member who does not desire to contribute to the legislative fund Account may have his dues reduced two cents (2c) per month, by notifying the lodge secretary in writing and paying his dues direct to the lodge secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the lodge secretary in writing and cannot be retroactive. The lodge secretary will acknowledge receipt of notice.

Associate Membership Per Capita Tax

General Fund Account (Grand Lodge)	$ .00
Convention Fund Account (Grand Lodge)	.00

Death Benefit Fund (Grand Lodge) 1.20

Official Publication Fund Account (Grand Lodge) ..... .60

*Railway Clerks Political League ..... .45

Total $2.25

*Any associate member who does not desire to make a voluntary contribution to Railway Clerks Political League may have his dues reduced 15c per month by notifying the lodge secretary in writing and making his payment direct to the lodge secretary. Reduction in dues will become effective with the month following the month in which the associate member notifies the lodge secretary in writing and cannot be retroactive. The lodge secretary will acknowledge receipt of the notice.

NOTE: An associate member is a member who has retired because of age and who performs no compensated service on a position in industry over which the Brotherhood claims jurisdiction, and per capita tax received on him is only allocated to those funds in which he has an interest or from which he receives service. The purpose of the voluntary contribution to Railway Clerks Political League is to advance and protect his interest through political activity in the legislative field and in particular to work for improvement of retirement systems established and maintained under law.

That Article 27, Section 4 (d) be amended to read as follows:

Board of Adjustment Per Capita Tax

(d) Board of Adjustment per capita tax shall be not less than two dollars and ten cents ($2.10) per member per month.

Mr. Chairman, I move adoption of the committee's report.

DELEGATE DEE: I second the motion.

GRAND PRESIDENT DENNIS: You have heard the committee's report. What is your pleasure?

The delegate at Mike 4.

DELEGATE JOHN J. CIRUCCI (Lodge 662): I would like to have a point of privilege. It is not spelled out what secretary collects the dues. Is that the recording secretary or is it the financial secretary?

GRAND PRESIDENT DENNIS: I can't hear you, brother.

DELEGATE BARFIELD (Lodge 1157): Mr. Chairman and delegates to the Convention: I rise in opposition to the committee's report as it is now written because it proposes to increase—not because it proposes to increase the dues, but because the proposed increase is too small. It is entirely insufficient in that it fails to provide the proper financial relief to the local lodges. As all of you know, the membership of the local lodges has declined steadily for the past several years, and all present indications point to a continued decline for some time to come. This reduction in membership has not resulted in a corresponding decrease in the work and duties to be performed by the local lodge officers. Rather, the officeres are now confronted with complex problems never dreamed of several years ago, such as computers, and with the policing of such agreements as the Union Shop Agreement and the February 7, 1965 Stabilization of Employment Agreement. The vast majority of the local lodge officers receive salaries which were fixed years ago and which even at that time were not commensurate with the responsibilities and duties required of them.

Instead of the salaries of the local lodge officers being adjusted periodically in proportion to the general wage increases applicable to the members we represent and in proportion to the salary increases voted for the system board officers and the Grand Lodge officers, it has been necessary in many cases to reduce the already inadequate amounts paid to the lodge officers. These reductions have been due solely to the loss of revenue resulting from the shrinkage of Class 1 membership.

Many of the lodges I represent have received communications from the Grand Lodge directing them to reduce expenses. In most of these cases, the directives can be complied with only by reducing the ridiculously low salaries of the local lodge officers. Other lodge expenses have also risen, just as the Grand Lodge and system boards' expenses have risen.

The increase proposed by the Committee on Laws would in the case of a lodge with one hundred Class 1 members amount to only $10 per month. Why not get what we need now? It will be four years before we

have another convention. Also by taking action at this time, we can eliminate the necessity of attempting to effect the dues increase through the individual system boards of adjustment.

Therefore, I move that the motion now before the convention be amended to provide for an increase in dues of $1.50 per month, with minimum dues of $6.00 per month with a 50c per month increase in the Grand Lodge per capita tax, a 50c per month increase in the system boards' per capita tax, and a 50c per month increase in the amount retained by the lodges for their use.

Thank you.

DELEGATE C. M. ENGLADE (Lodge 118): I second the amendment to the motion. (Applause)

GRAND PRESIDENT DENNIS: All right. You heard the amendment, and it is seconded, which as I understand it would establish a six dollars minimum dues instead of a five dollar and fifty cents minimum as proposed by the committee, with 50c going to the Grand Lodge, 50c to the system board, and 50c to the local lodge.

The delegate at Mike 2.

DELEGATE CHARLES H. PURKISS (Lodge 182): I am secretary-treasurer of the California State Legislative Committee. I got a little bit thinned out on the funds for increasing for our state legislative per capita. In trying to look ahead for four years with, I think, the increasing amount of political action we are going to have to take, coupled with the fact that California is a long state, being some twelve hundred miles in length, I would like to, if it is legally possible, amend the good brother's amendment by making that portion 40c to the local lodge and 10c to the state legislative committees.

. . . Cries of "No" . . .

GRAND PRESIDENT DENNIS: Is there a second to that amendment? It has to have a second on the amendment.

DELEGATE LESLIE A. CRAVER (Lodge 45): Mr. Chairman, I second that amendment.

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EXHIBIT G

EXCERPTS FROM THE PROCEEDINGS OF THE 23RD REGULAR AND 9TH QUADRENNIAL OF THE BRAC, MAY 1967

* * *

What is your pleasure?

. . . The question was called . . .

Those in favor raise your right hand; down hands; those opposed; the report is adopted.

The Laws Committee is ready to continue with their report, and we will now hear from the Laws Committee. Brother Geral Toppen and Brother Arch Fitzjarrell will report.

DELGATE TOPPEN: We ask that you turn to pge 13 of the Committee's report.

I would like to make these comments before setting out the final deliberation, or teh deliberations of the Laws Committee after this afternoon's session was recessed.

Your Committee considered approximately 10 proposals that were presented in writing. These written documents did not object to an increase in dues; however, there was an indication that the delegates did not desire to increase the dues quite as much as originally proposed by the Committee.

The basic thrust of the written documents was to the distribution of the dues increase.

It was further apparent that the objections were raised to the Committee's report with respect to the step rate increase of dues.

It was your Committee's understanding at the conclusion of the afternoon session that we were to take all of the written documents submitted by the delegates at this Convention and analyze same without regard to whether or not this Convention's rules were complied with in submitting amendments to a committee report; this we did. No suggestion was discarded on parliamentary procedure handling; all were considered.

Your Committee attempted to arrive at a consensus of opinion of the delegates through a review of the suggestions made. Frankly, it is our desire to hit a happy medium. It would be impossible, however, to satisfy everyone in this respect, and we hope that the delegates put aside their

individual problems so as to permit this Convention to find a harmonious solution to a very difficult and vexing problem.

With respect to your Committee's report, appearing on page 13, your Committee proposes to change its recommendations on initiation and reinstatement fees by changing the allocation of funds to give the Grand Lodge $10.00; the System Board $10.00; and the Local $10.00, out of each initiation fee. That is right down the line, 10, 10, and 10.

The Committee proposes to change its report to give the Grand Lodge $20.00; the System Board $10.00; and the Local Lodge $15.00 out of each reinstatement fee.

Page 13 of the Committee's report would be corrected accordingly. You will notice there where it says, "The Grand Lodge shall receive fifteen" — change that to "ten"; and where it says "of each initiation fee and twenty-five dollars", you would change that to read "twenty".

With respect to the Grand Lodge, they would be getting five dollars less, so that initiation fee — General Fund Account for the Grand Lodge would be changed from $11.25 to $6.25; and reinstatement fee to Grand Lodge, General Fund, instead of being $21.25 would read $16.25.

And then, at the bottom there, the Board of Adjustmen [*sic*] shall receive $10.00 from each initiation or reinstatement fee, the remainder to be retained by the Local Lodge. So you can make that $8.00 read $10.00, and then from each initiation and reinstatement fee the remainder to be retained by the Local Lodge. Do you have those corrections?

Also, a paragraph would be added to provide that any subordinate unit that desires to establish an initiation fee or reinstatement fee above the $30.00 and $45.00 amount recommended by the Committee shall be permitted to do so if a majority of the members of said unit and the International President approve same.

On page 14, I will read the sections. Section 2(a). This is what your Committee proposes. "Effective July 1, 1971, all full dues established by the 1967 Convention or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division, shall be increased $5.50 per member per month, except that no full dues shall be less than $11.00 per member per month."

Now, we would take out the second paragraph completely. It would be just a one step deal. That "Effective July 1, 1973" can be scratched, that whole paragraph there that is underlined.

Then it would read, the next paragraph: "There shall be two kinds of dues applicable to members of the Brotherhood. Effective July 1, 1971 full dues shall be not less than $11.00 per member per month, of which a minimum of $2.00 per member per month shall be retained for State Legislative tax and the use of the lodge."

Then you could scratch out "Effective July 1, 1973" because there would be no dues increase July 1, '73. So start scratching out "Effective July 1, 1973." The next full line; the third full line; the fourth full line; the fifth full line; where "the lodge" is on the sixth line, before the semicolon. The rest there, there would be no change. That is the retention of membership provision.

On page 15, that $10.00 would be changed to $11.00. That would be a minimum of $11.00 per member per month effective July 1, 1971; the balance of that line and up to July 1, 1971, line 3 to be scratched. That would be the change on page 15.

On page 16: "That Article 27, Section 4(a) be amended to read as follows:

"Effective July 1, 1971 Grand Lodge per capita tax shall be $4.20 per member per month or $12.60 per quarter." So that $4.00 would be $4.20, and the $12.00 would be $12.60.

And in connection with that, the per capita tax on full dues paying members, the General Fund Account of the Grand Lodge would be changed from $7.50 to $8.10. And the total at the bottom would be changed from $12.00 to $12.60.

Page 17. Those first two paragraphs on page 17, starting with "Effective July 1, 1973," all the way down to where the asterisk appears, would be scratched out because there would be no second dues increase.

Then you can turn to page 19, if you will please. That would read, "Effective July 1, 1971 Board of Adjustment and System Division per capita tax shall be not less than $4.20 per member per month." The rest of that paragraph would be scratched out.

Now, basically, in the allocations and in this increase, it would give each unit of the Brotherhood the same proportionate amount.

Mr. Chairman, I move adoption of the Committee's report as amended.

DELEGATE FITZJARRELL: I second the motion.

INTERNATIONAL PRESIDENT DENNIS: As I understand it, the $2.10 out of the present minimum dues of $5.50 to the Grand Lodge would become $4.20. The $2.10 to the System Board would become $4.20. And the $1.30 to the Local Lodge would become $2.60, or a 100 percent increase across the board, making a total of $11.00, and it would be a one step proposition.

Mike 2.

DELEGATE WILLIAM H. McCARTHY (Lodge 1298): I think this is in order. I move that we divide the question, and debate and vote on each section of the amended Article 27 separately.

DELEGATE DAVID C. TRAYNOR (Lodge 361): I second the motion.

INTERNATIONAL PRESIDENT DENNIS: Well, I think that the initiation fee and the reinstatement is divisible. I mean that is separate and apart, but when we get into the dues, I do not think we can divide that section by section. It has to be a total package.

We can handle the initiation and the reinstatement fee separately, and take a vote on that question. That was ten, ten and ten on the initiation, and twenty, ten and fifteen for the local lodge on the reinstatement.

Now, is it the desire of the Covention [*sic*] to divide the question and handle the initiation and reinstatement fee separately from the dues question? Is that the desire?

. . . Cries of "No" . . .

INTERNATIONAL PRESIDENT DENNIS: Those in favor of dividing the total question, handle the initiation and the reinstatement

fee separately, those in favor of doing that please raise your right hands. Down hands. Those opposed.

Well, I think the question will be divided. We will take a vote on the initiation fee and reinstatement fee part of the committee's report which pertains to the initiation fee and reinstatement fee—I am trying to explain this first, and then I will give you the mike.

The initiation fee would be divided $10 to the Grand Lodge, $10 to the System Board, and $10 to the Local Lodge. A reinstatement fee would be $20 to the Grand Lodge, $10 to the System Board, and $15 to the Local Lodge.

That is the question. Mike 2.

DELEGATE ROBERT J. CRANCH (Lodge 8007): President Dennis, in respect to—a point of information—in respect to the $30 initiation fee that is facing us now, we do not have a closed shop in Canada. We have a check-off of Union dues.

The question that I am asking is this: Would it be possible for the System Division to collect the monthly dues until such time as the monthly dues accumulated becomes the initiation fee and then it would be simply to sign the member up as a member, or would it have to be a cash payment of $30?

INTERNATIONAL PRESIDENT DENNIS: Brother Cranch, I think I can alleviate the problem. We recognize that there is a difference, that you have a different kind of an arrangement in Canada. And there would be no requirement—there is no requirement now for an initiation fee, right?

DELEGATE CRANCH: Right.

INTERNATIONAL PRESIDENT DENNIS: That policy would continue.

DELEGATE CRANCH: I am sorry.

INTERNATIONAL PRESIDENT DENNIS: It is all right.

DELEGATE CRANCH: Right now the member must pay an initiation fee of $10. The question that I am asking is, is the accumulation of

the union check-off, as an example, if the dues were $10.00 a month times three, he could not join until he had three months dues deductions. He could not join until the fourth month.

INTERNATIONAL PRESIDENT DENNIS: Well, let me find out what the practice in Canada is at the present time.

INTERNATIONAL VICE PRESIDENT McGREGOR: Brother Cranch, as I understand it, you are talking about Canadian Pacific Airlines?

DELEGATE CRANCH: Principally, Bill, yes.

INTERNATIONAL VICE PRESIDENT McGREGOR: Where you presently do pay an initiation fee?

DELEGATE CRANCH: They pay it out of their pocket.

INTERNATIONAL VICE PRESIDENT McGREGOR: They pay it out of their pocket? Well, that is not what Brother Dennis was talking about, International President Dennis. That is different from what we have on the rail, where your monthly dues, as collected by the modified Rand formula until you have paid sufficient to pay your initiation fee is considered to be your initiation fee.

DELEGATE CRANCH: There is a correction, Bill, on CN Rail they too pay $10 out of their pocket in order to become a member.

. . . Cries of "No" . . .

INTERNATIONAL PRESIDENT DENNIS: Well, let me put it this way. If the Canadian lodges and Canadian membership have any problem on this initiation fee, I am sure that Brother McGregor can work it out with the General Chairman along with Brother Dick Smith and there will be no problems.

DELEGATE CRANCH: Fine, I have my answer from a GS and T of the BRAC organization. I am satisfied now.

INTERNATIONAL PRESIDENT DENNIS: Okay. Mike 3.

DELEGATE HERSHELL L. OLIVER (Lodge 1913): I move that we adopt the Committee's report.

DELEGATE OSCAR DERDERIAN, SR. (Lodge 106): I second the motion.

INTERNATIONAL PRESIDENT DENNIS: Now are you talking about the divided report, or the whole report? You are talking about the initiation fee and reinstatement, right?

DELEGATE OLIVER: Right.

INTERNATIONAL PRESIDENT DENNIS: That is what we have before the house.

DELEGATE OLIVER: Right.

INTERNATIONAL PRESIDENT DENNIS: All right.

DELEGATE WILLIAM T. GALLAHER (Lodge 2100): Mr. Chairman, a point of personal privilege, please.

. . . Cries of "Oh" . . .

INTERNATIONAL PRESIDENT DENNIS: Brother Gallagher, I have recognized you, you know, for quite a few times, and if every delegate got up for personal privilege as frequently as you have we would be here for quite awhile. (Applause and whistles)

I hate to do this, but we are on this question now. Let us get to the bottom of this question, and then later on the point of personal privilege should not be recognized for a statement at this time. We are discussing this issue. Unless it is on this question, either for or against, I have to deny you the right to speak at this time. (Applause)

All right, are you ready to vote?

. . . The question was called . . .

INTERNATIONAL PRESIDENT DENNIS: Those in favor of the committee's amended report, that the initiation fee and reinstatement fee be amended to provide that—reinstatement and fees by changing the

allocation to give the Grand Lodge $10, the System Board $10, and the Local Lodge $10, out of each initiation fee. The Committee proposes to change its report to give the Grand Lodge $20, the System Board $10, and the Local Lodge $15 out of each reinstatement fee.

Then also that any subordinate unit desiring to increase the initiation fee or reinstatement fee above the $30 or $45 recommended by the Committee shall be permitted to do so if a majority of the members of said unit and the International President approves same.

Now, that is what we are voting on. Those in favor please raise your right hands. Down hands. Those opposed.

That portion of the Committe's [*sic*] report is adopted. (Applause) In excess of a two-thirds vote.

Now the question of dues is in the balance of the report. The Committee's report is that the second step be eliminated. The $12 step be eliminated, and we have a dues of $11; that the present minimum of $5.50 become $11.00; and that the Grand Lodge portion, which is $2.10 become $4.20, the System Board portion, which is $2.10 become $4.20; and the local lodge portion which is $1.30 become $2.60. A complete equal distribution across the board.

Then the distribution of the funds are as detailed by the Chairman of the Laws Committee.

That is the question before us now. Mike 2.

DELEGATE T. B. GOODWIN (Lodge 8043): Brother Dennis, before I made a motion that the Canadian delegation—that the President—my amendment to the motion was that the present Grand Division portion of the per capita tax not be changed for the Canadian membership at this time.

I feel that it is only right to explain to the sisters and brothers from the States why I made this amendment.

First, I wish to state that we are not opposed to an increase in dues. We in Canada are not afraid to face our membership because we too have made good gains, and we want to carry our weight.

However, for the United States brothers and sisters, I would like to state what we are up against north of the border.

In Canada we have two major railways, the Canadian Pacific, which is represented by BRAC. BRAC only represents the TC employees on the Canadian National. The balance of clerks are represented by a National Union, the Canadian Brotherhood of Railway Transport and General Workers. Their dues are $5.50 per month. You are now asking us to increase our dues to $11.00, double theirs for the same representation.

When we negotiate in Canada, we. . . .

* * * *

. . . their specific problems. So now we will vote on the previous question.

The previous question is the amendment made by the Brother from Roanoke, and that amendment that he made reads as follows: "That Article 27, Section 2, be amended to read as follows: Section 2(a) —"

I have to put the question to see if the majority want the previous question. My parliamentarian here so advises me. Those in favor of moving the previous question please vote by raising your right hands. Down hands. Those opposed.

We will now vote on the previous question. The previous question that was brought up was the amendment made by the Delegate from Roanoke, which reads as follows. It was an amendment to the Committee's revised report. "Section 2(a). Effective July 1, 1971, all full dues established by the 1967 Convention, or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division shall be increased $2.50 per member per month, except that no full dues shal [*sic*] be less than $8.00 per member per month.

"Effective July 1, 1973, all full dues established by the 1971 Convention or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division shal [*sic*] be increased $2.00 per member per month, except that no full dues shall be less than $10.00 per member per month, and distribution of dues proportionately."

This is submitted by the Delegate from Lodge 1385, Roanoke, Virginia. I don't have that Delegate's name, but I guess it is in the record.

Now, that was the amendment from the floor to the Committee's report. We will first vote on that amendment. And then if that amendment carries, we will vote on the total report as amended. If it loses, we will then vote on the Committee's report. Is that clear? So you are now voting on the amendment of the Delegate who submitted if from the floor.

Those in favor of the amendment from the floor please raise your right hands. Down hands. Those opposed. The amendment is lost.

We will now vote on the Committee's report, and the Committee's report was that the dues shall be $11.00 and the Grand Lodge portion would be $4.20 a month; the System Board portion $4.20; and the Local Lodge portion $2.60, with the understanding as I stated previously, any General Chairman who thinks he does not need that much money can write in and get forgiveness from the International President.

Are you ready to vote?

. . . Calls for the question . . .

INTERNATIONAL PRESIDENT DENNIS: Those in favor of the Committee's report please raise your right hands. Down hands. Those opposed.

Well, let's see if we can see a little better by a standing vote. Those in favor of the Committee's report please rise.

. . . Those in favor of the motion arose . . .

INTERNATIONAL PRESIDENT DENNIS: Everybody rise who is in favor of the Committee's report, and we will have the Tellers tabulate their particular tables. It looks to me like we have two thirds.

. . . Cries of "Oh" and applause . . .

INTERNATIONAL PRESIDENT DENNIS: This is the Committee's amended report. You see, the TC Division over on this side of the house only has a half a vote.

. . . Cries of "Roll call" . . .

INTERNATIONAL PRESIDENT DENNIS: And I will bet my right arm that there's two thirds of the Delegates standing.

. . . Cries of "No" and "Roll call" . . .

INTERNATIONAL PRESIDENT DENNIS: Now we are not going to gain anything by a lot of hollering. I will do what this Convention wants me to do. I am trying to be fair and honest about this thing. I could very easily say that this is a two-thirds vote. So now, if anybody wants to get a little rough with the Chair, the Chair in turn will get a little rough with them. (Applause)

Now, I have tried to be considerate. (Applause)

I now declare we have a two-thirds vote standing. (Applause and cheers) And this is the ruling of the Chair. (Applause and cheers)

DELEGATE TOPPEN: Committee Report No. 5, page 4, Resolution No. 7, page 4.

DELEGATE F. M. SHEAHAN (TC Division 1): Mr. Chairman, Mr. Chairman.

INTERNATIONAL PRESIDENT DENNIS: What is the problem?

DELEGATE SHEAHAN: Point of privilege.

INTERNATIONAL PRESIDENT DENNIS: State it.

DELEGATE SHEAHAN: I have a point of privilege.

INTERNATIONAL PRESIDENT DENNIS: State your point.

DELEGATE SHEAHAN: I wish to challenge the Chair on the vote. (Applause and cheers)

DELEGATE JOAN D. BRDA (Lodge 36): I second the motion. (Applause)

INTERNATIONAL PRESIDENT DENNIS: All right. If two-thirds of the Delegates challenge the decision of the Chair, we will then have a roll call vote. (Applause)

Now, those delegates who wish to challenge the decision of the Chair please rise.

. . . Those who wished to challenge the decision of the Chair arose . . .

INTERNATIONAL PRESIDENT DENNIS: That is not two-thirds of the house. (Applause and cheers)

The decision of the Chair stands.

DELEGATE TOPPEN: Committee Report No. 5, page 4, Resolution No. 7, page 4.

This resolution has been submitted by one of our Canadian Board of Adjustments to delete that portion of Article 5, Section 3, pages 6 and 7 of the Grand Lodge Constitution, pertaining to partisan politics.

Your committee feels that the primary purpose of such submission was to clearly establish the current practice of allowing the International Vice President-Canada, with the approval of the International President, to support political parties in Canada. It is necessary to support a party as a whole, rather than individual candidates, so as to effectively exert political strength in behalf of our Canadian membership. The Canadian political system is different than the United States System, and we must give recognition to this difference.

Your committee feels that our current policy, as announced at the last Brotherhood Convention, contemplates such handling of endorsement of political parties by our Canadian International Vice President; however, we desire to clearly establish through this minor constitutional amendment the current practice now being followed.

The committee on Grand Lodge Constitution and Laws proposes to amend Article 5, Section 3, on pages 6 and 7 of the Constitution of the Grand Lodge, as follows:

THAT ARTICLE 5, SECTION 3 BE AMENDED TO READ AS FOLLOWS:

"Section 3. The influence or sympathy of the Brotherhood as a body shall never be enlisted or used in favor of any religious organization. No member is permitted to discuss in any manner (in meetings while

discussing Brotherhood business) any religious matters, or criticize the religious belief of any member; nor can the influence or sympathy of the Brotherhood as a body be used in favor of partisan politics, or any political party, (except where the International Vice President-Canada, with the authority of the International President and in accordance with Canadian Laws, has made such an endorsement in Canada), and any lodge permitting the same to be done shall have its charter suspended, and all members participating in such discussion shall be subject to expulsion."

Mr. Chairman, I move adoption of the committee's report.

DELEGATE FITZJARRELL: I second the motion.

INTERNATIONAL PRESIDENT DENNIS: You have heard the committee's report. What is your pleasure?

. . . The question was called . . .

INTERNATIONAL PRESIDENT DENNIS: Mike 2.

* * *

EXHIBIT H

1971 CONSTITUTION

ARTICLE 25
REPRESENTATION

American Federation of Labor and Congress of Industrial Organizations

Section 1. Representatives to Conventions of the American Federation of Labor and Congress of Industrial Organizations shall consist of the International President and such other members appointed by him in number sufficient to give the Brotherhood the representation to which it is entitled under the governing laws of the American Federation of Labor and Congress of Industrial Organizations. The allowance to delegates (except International Officers and full-time employes of the Grand Lodge) shall be on the same basis as was provided for delegates attending the preceding Grand Lodge Convention. Full-time International Officers and employes shall be paid their expenses and regular salaries.

ARTICLE 26
COMMUNICATING—SOLICITING FUNDS

Section 1. A subordinate unit, officer, committee member, or member shall not send circulars or letters to any subordinate unit or member encouraging or advocating violation of, or having the tendency or effect of violating, the obligations imposed upon them by Article 5 of this Constitution.

Section 2. (a) Subordinate units, officers, committee members and members must not solicit funds in the name of the Brotherhood unless authorized by the International President.

(b) A subordinate unit of the Brotherhood shall not be denied the right to publish souvenir programs for social functions when they do not carry paid advertising, nor are social functions conducted by a subordinate unit prohibited when the sale of tickets is handled by its own member.

ARTICLE 27
FEES AND DUES

Section 1. The initiation fee of the Brotherhood shall be thirty dollars ($30.00) and the reinstatement fee of the Brotherhood shall be forty-five dollars ($45.00). The initiation or reinstatement fee may be waived in whole or in part by the International President on applicants for membership who are in the service of an employer where the Brotherhood is conducting an organization campaign or endeavoring to

establish or maintain right of representation for collective bargaining. The Grand Lodge shall receive ten dollars ($10.00) of each initiation fee and twenty dollars ($20.00) of each reinstatement fee, which shall be apportioned as follows:

	Init. Fee	*Rein. Fee*
General Fund Account (Grand Lodge)	$ 6.25	$16.25
Protective Fund Account (Grand Lodge)	1.50	1.50
Convention Fund Account (Grand Lodge)	.60	.60
Death Benefit Department Fund (Grand Lodge)	.90	.90
Official Publication Account (Grand Lodge)	.30	.30
Organization Fund Account (Grand Lodge)	.45	.45
Total to Grand Lodge	$10.00	$20.00

The Board of Adjustment shall receive ten dollars ($10.00) from each initiation or reinstatement fee, the remainder to be retained by the Local Lodge.

Any subordinate unit that desires to establish an initiation fee above the thirty dollar ($30.00) or a reinstatement fee above the forty-five dollar ($45.00) amount shall be permitted to do so provided a majority of the members of said unit and the International President approves same.

Section 2. (a) Effective July 1, 1971, all full dues established by the 1967 Convention, or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division, shall be increased five dollars and fifty cents ($5.50) per member per month, except that no full dues shall be less than eleven dollars ($11.00) per member per month.

There shall be two kinds of dues applicable to members of the Brotherhood. Full dues shall be not less than eleven dollars ($11.00) per member per month of which a minimum of two dollars and sixty cents ($2.60) per member per month shall be retained for State Legislative tax and the use of the lodge; retention of membership dues, which shall be one dollar and fifty cents ($1.50) per member per month, of which forty cents (40c) shall be retained for the use of the lodge. Full dues shall apply to each member who receives pay for forty (40) hours or more in any calendar month on a position in industry over which the Brotherhood claims jurisdiction, or the equivalent compensation under any agreement between an employer and the Brotherhood; to a member promoted to excepted or official positions and a member taking a voluntary leave of absence requiring approval of the organization.

Each Board of Adjustment and System Division is authorized to fix uniform dues (above the minimum of eleven dollars ($11.00) per member

per month) to apply to all members subject to the scope rule of each individual contract under the jurisdiction of the Board of Adjustment or System Division, provided such dues shall be sufficient to meet Grand Lodge per capita tax, lawfully approved Board of Adjustment or System Division per capita tax and State Legislative Committee per capita tax, subject to the approval of the International President.

Retention of membership dues shall apply to a member who performs no service in a calendar month due to reduction in force, furlough, military service, sickness, disability, resignation, and a member who receives pay for less than forty (40) hours in any calendar month on a position in industry over which the Brotherhood claims jurisdiction; and a member working in another craft in the industry where he is required to join another union under a Union Shop Agreement.

Members who have retired because of age and who perform no compensated service on a position in industry over which the Brotherhood claims jurisdiction will be classified as associate members, with full rights to participate in the Death Benefit Department, if qualified, receipt of RAILWAY CLERK/interchange, with right to attend lodge meetings of the Brotherhood, except they shall have no vote in the election of officers, or on matters pertaining to wages, rules, working conditions or grievances, and they may retain such membership by the voluntary payment of one dollar and fifty cents ($1.50) per month.

(b) Subordinate units shall be allowed appropriate credit on the quarterly per capita tax report for sick and out-of-work members. The subordinate unit will be billed on per capita tax report for members in military service and members drawing disability pension or age and service pension at the reduced per capita tax rate.

(c) Subordinate units shall not be permitted to waive dues of any member or officer except that members on strike over two (2) weeks and who have not secured other employment shall be exempt from the payment of dues.

(d) In the event of extraordinary circumstances, involving ongoing organizational efforts, new representation, specific national problems, restrictive labor laws, or other unusual circumstances, any subordinate unit may petition the International President for permission to lower the minimum Board of Adjustment, System Division or Local Lodge per capita tax specified herein and elsewhere. The International President may grant such waiver subject to annual review by him, provided that, in his judgment, the needs of the Brotherhood can be adequately met and the circumstances warrant such action.

(e) In the event of extraordinary circumstances involving new organizational efforts, newly acquired representation rights, initial contracts, and situations wherein existing rates of pay or working conditions

are determined to be below the over-all pattern of our Brotherhood, any subordinate unit or units involved may petition the International President for, or the International President may initiate on his motion, a partial reduction of the Grand Lodge per capita tax for the members covered by the respective contract or organizing situation, subject to the approval of the Finance Committee. Reductions so granted shall not extend beyond the term of the initial contract unless resubmitted and approved by the Finance Committee.

Assessments

Section 3. No assessment shall be levied by any subordinate unit except by approval of the International President.

PER CAPITA TAX

Section 4. (a) Grand Lodge per capita tax shall be four dollars and twenty cents ($4.20) per month or twelve dollars and sixty cents ($12.60) per quarter on full dues paying members, except that no per capita tax is payable on new or reinstated members for the quarter in which they apply for membership; one dollar and ten cents ($1.10) per month or three dollars and thirty cents ($3.30) per quarter on reduced dues paying members and shall be apportioned quarterly by the International Secretary-Treasurer to the different funds and fund accounts as follows:

Per Capita Tax on Full Dues Paying Members

General Fund Account (Grand Lodge)	$ 3.10
Protective Fund Account (Grand Lodge)	.75
Convention Fund Account (Grand Lodge)	.60
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
Organization Fund Account (Grand Lodge)	1.25
*Legislative Fund Account (Grand Lodge)	.10
Total	$12.60

*Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third cents (3⅓c) per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

Retention of Membership Per Capita Tax

General Fund Account (Grand Lodge)	$ .80
Convention Fund Account (Grand Lodge)	.60
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
*Legislative Fund Account (Grand Lodge)	.10
Total	$3.30

*Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third cents (3⅓c) per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues becomes effective with the month following the month in which the member notifies his Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

Associate Membership
Per Capita Tax

General Fund Account (Grand Lodge)	$ .75
Convention Fund Account (Grand Lodge)	.00
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
*Railway Clerks Political League	.75
Total	$3.30

*Any Associate member who does not desire to make a voluntary contribution to Railway Clerks Political League may have his dues reduced 25c per month by notifying his Financial Secretary in writing and making his payment direct to said Secretary. Reduction in dues will become effective with the month following the month in which the Associate member notifies his Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of the notice.

NOTE: An Associate member is a member who has retired because of age and who performs no compensated service on a position in industry over which the Brotherhood claims jurisdiction, and per capita tax received on him is only allocated to those funds in which he has an interest or from which he receives service. The purpose of the voluntary contribution to Railway Clerks Political League is to advance and protect his interest through political activity in the legislative field and in particular to work for improvement of retirement systems established and maintained under law.

(b) Grand Lodge per capita tax is payable quarterly in the month following the close of each calendar quarter. Tax for the first quarter of each calendar year is payable in April; second quarter tax in July; third quarter tax in October, and fourth quarter tax in January. Failure of a subordinate unit to pay Grand Lodge tax within the time specified above subjects it to suspension. Members in good standing of such suspended subordinate unit may transfer to another subordinate unit.

(c) Per capita tax advanced on members who are not subject to suspension under the provisions of Article 6, Section 1, of the Lodge Statutes or the By-Laws of other subordinate units, at the time quarterly per capita tax report is made to the International Secretary-Treasurer, shall upon proper certification be credited to the lodge or subordinate unit by the International Secretary-Treasurer for any month of the current quarter and the last month of the previous quarter for which dues were not paid.

Board of Adjustment Per Capita Tax

(d) Board of Adjustment and System Division per capita tax shall be not less than four dollars and twenty cents ($4.20) per member per month.

Section 5. All monies received by the International Secretary-Treasurer shall be deposited in the General Fund of the Brotherhood and each of the above fund accounts shall be credited with its proportion of the fees and dues as provided above, and separate records kept of each fund and fund account; provided, however, the Death Benefit Fund shall be maintained separate and apart from all other fund accounts of the Brotherhood.

Section 6. The International Secretary-Treasurer shall be the custodian of all funds.

EXHIBIT I

POLICY STATEMENT OF THE BRAC ISSUED BY THE INTERNATIONAL PRESIDENT AND APPROVED BY THE EXECUTIVE COUNCIL

SUBJECT: Procedure Providing Reductions In Dues and Agency Fees To Members And Non-Members Who Object To The Use Of Their Union Dues Or Agency Fees For Political Purposes Not Germane To Collective Bargaining.

REASON FOR ADOPTION OF THE POLICY STATEMENT: In 1963, the United States Supreme Court rendered its decision in the case of *BRAC v. Allen* (1963) 373 U.S. 113. That decision held that objecting members of a labor union were entitled to a reduction in their dues obligations in the same proportion that total union expenditures for political purposes not germane to collective bargaining bore to total union expenditures. In so ruling, the Court recognized the right of unions to expend dues and agency fees collected pursuant to collective bargaining agreements in support of all activities germane to collective bargaining and to expend non-dissenters' dues and fees for political purposes not germane to collective bargaining. Only the expenditures of dissenters' dues and fees for political purposes not germane to collective bargaining were subject to the refund. Unions were urged by the Court to adopt voluntary internal procedures to accomplish the refunds without the necessity of judicial recourse.

Although most of the funds this union expends on political purposes not germane to collective bargaining are raised through voluntary contributions to the Railway Clerks Political League (expenditures to or in behalf of candidates for Federal office are made from these voluntary contributions), some such political expenditures are made from dues and agency fees. While the Supreme Court has recognized the legality of these expenditures from union dues and fees, the Court has also recognized the right of dissenters not to pay mandatory dues and fees which are expended for political purposes not germane to collective bargaining.

This union was a party in the *Allen* case and, in an effort to comply with the mandate of the Court, we adopted the dues reduction procedure presently embodied in Article 27, Section 4(a) of the Constitution of the Grand Lodge. Three and one-third cents per month was thought to constitute an approximation of the dues reduction required by the United States Supreme Court.

Recent developments have suggested the necessity for adoption of a policy expanding and clarifying the dues reduction procedure. Certain members of our union and certain non-members paying agency fees instituted a lawsuit seeking, among other relief, to compel the adoption of a procedure which would permit objecting members and non-members to recover that proportion of their dues and agency fees being spent on political purposes not germane to collective bargaining to which they had objection. In addition to the lawsuit, confusion regarding the availability of the three and one-third cent dues reduction to non-members paying agency fees suggested the necessity for clarification and expansion of the policy on dues reductions. Furthermore, it is recognized that the allocation made some years ago may no longer correlate with actual expenditures of dues and fees for political purposes not germane to collective bargaining.

POLICY: The following policy statement is declared by the International President and the Executive Council, to be applicable to members and non-members in the United States paying dues or agency fees, effective January 1, 1974:

1. Any member or non-member who pays dues or agency fees pursuant to a collective bargaining agreement shall have the right to object to the expenditure of a portion of his dues or agency fees for political purposes not germane to collective bargaining.

2. Expenditures for political purposes not germane to collective bargaining shall include the following expenditures:

(a) Expenditures for payments to or on behalf of any candidate for public office in connection with said candidate's campaign for election to such public office.

(b) Expenditures to or on behalf of any political party or political organization.

(c) Expenditures for the holding of any meeting or printing or distribution of any literature or documents in support of or opposition to any such candidate, political party, or political organization.

(d) Expenditures to or on behalf of any organization which espouses a political viewpoint or ideology for purposes not germane to

collective bargaining.

3. The board of Trustees of the Grand Lodge shall review the records of the union maintained by the International Secretary-Treasurer and shall determine the amount of receipts from dues and agency fees expended for political purposes not germane to collective bargaining by this union, including specifically such expenditures by the Grand Lodge, the System Boards of Adjustment, the State Legislative Committees, and the Local Lodges, in each of the past three years. The figures for each year of the last three shall be added together and divided by three to determine the average expenditure for political purposes not germane to collective bargaining.

4. The Board of Trustees of the Grand Lodge shall likewise compute the average receipts from dues and agency fees by computing the total receipts from dues and agency fees in each year of the last three years, adding the figures for each year together, and dividing that sum by three.

5. The Board of Trustees of the Grand Lodge shall then compute the proportion of the average receipts of dues and agency fees which is expended on political purposes not germane to collective bargaining by dividing the average expenditures for political purposes not germane to collective bargaining by the average receipts of dues and agency fees.

6. The above described computations by the Board of Trustees shall be made annually in the month of February, using the figures for the preceding three years. If the ratio of expenditures for political purposes not germane to collective bargaining to receipts of agency fees and dues, when multiplied by the monthly dues or agency fee obligation of an objecting member or non-member, is less than three and one-third cents per month, the amount of the dues reduction shall nevertheless be three and one-third cents per month.

7. Any member or non-member who perfects such an objection to the expenditure of dues or agency fees for political purposes not germane to collective bargaining shall be entitled to a reduction in such dues or agency fee obligation in the same proportion that average expenditures for political purposes not germane to collective bargaining bears to average receipts of dues and agency fees.

8. Any member paying dues or non-member paying agency fees may perfect such an objection by individually notifying the Financial

Secretary of the Local Lodge or the General Secretary and Treasurer of the System Division to which dues and fees are paid by certified or registered mail, provided, however, that such objection shall be timely during the first thirty days of union membership and during the first thirty days of each calendar year, except as provided in paragraph 10. An objection may be continued from year to year only if renewed during the thirty day period at the beginning of each year. Objecting members and agency fee payers who pay their dues or agency fees directly to their Local Lodge Financial Secretary or to their System Division General Secretary and Treasurer shall be entitled to a reduction in their dues or agency fees of that proportion of their monthly dues and agency fees which is the same as the ratio of average expenditures for political purposes not germane to collective bargaining to average receipts of dues and fees. Objecting members and agency fee payers who wish to pay their dues or agency fees through a company check-off shall receive an annual refund of that proportion of their dues and agency fees which is the same as the ratio of average expenditures for political purposes not germane to collective bargaining to average receipts of dues and fees.

9. If an objecting member or agency fee payer is dissatisfied with the proportional allocation made by the Board of Trustees of the Grand Lodge, said individual may appeal the ruling to the International President. If the objector is then dissatisfied with the decision of the International President, said individual shall have the right of an appeal to the Executive Council and, thereafter, if still dissatisfied, of an appeal to the Convention.

10. Any objecting dues paying member or non-member paying agency fees, who has filed an objection with the Local Lodge or System Division prior to the adoption of this policy statement, shall have said objection honored retroactively from the date of the original objection, provided such objecting member or non-member files with the Financial Secretary of the Local Lodge or General Secretary and Treasurer of the System Division a copy of the original objection along with a current objection; if a copy of the original objection is unavailable, the objecting member or non-member may file a statement declaring the date and content of the prior objection and the unavailability of a copy thereof along with a current objection. Renewal of prior objections, as well as new objections by members and non-members who had not previously objected, shall be timely if filed within ninety days of the effective date of this policy statement. Otherwise, objections shall be timely only as provided in paragraph 8.

Issued this 24th day of January 1974.

By: C. L. Dennis

C. L. Dennis
International President

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, PAMELA BALIAN, RAY SAULS, NANCY DEAN, PHYLLIS PAYNE, NOEL FONTAINE, SALLY LOUDIN,	CIVIL NO. 73-113-N
Plaintiffs,	ANSWER TO FIRST AMENDED COMPLAINT
vs.	
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES SYSTEM BOARD OF ADJUSTMENT NO. 451, AIR TRANSPORT DIVISION;	

CALIFORNIA STATE LEGISLATIVE COMMITTEE OF THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; SKYLINER LODGE LOCAL 3001; SKYHARBOR LODGE LOCAL 3014; and ARROWLINER LODGE LOCAL 3049,

Defendants.

Defendants Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes System Board of Adjustment No. 451, Air Transport Division; California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Skyliner Lodge Local 3001; Skyharbor Lodge Local 3014; and Arrowliner Lodge Local 3049 (hereinafter collectively referred to as "BRAC"), for answer to the First Amended Complaint on file herein, admit, deny and allege as follows:

1. In answer to the allegations of paragraph 1, defendants deny each and every allegation contained in said paragraph.

2. In answer to the allegations of paragraphs 2 and 3, defendants admit each and every such allegation.

3. In answer to the allegations of paragraph 4, defendants admit that the California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes is an unincorporated association, subsidiary to and affiliated with the BRAC, that the Committee sponsors political candidates, causes and legislation in the state of California, and that these activities are supported financially by thirty cents per member per month derived from the compulsory dues and fees paid by plaintiffs and others. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 4.

4. In answer to the allegations of paragraphs 5 and 6, defendants admit each and every allegation.

5. In answer to the allegations of paragraphs 7 and 8, defendants admit that the agreements attached to the complaint as Exhibits A, B, and C are agreements executed by BRAC and Western and that said agreements set forth terms and conditions relating to the obligations of employees with respect to BRAC. Except as expressly admitted, defendants deny each and every allegation of paragraphs 7 and 8.

6. In answer to the allegations of paragraph 9, defendants admit that plaintiffs refer in their complaint to the union security provisions of the collective bargaining agreement as "compulsory union membership agreement."

7. In answer to the allegations of paragraph 10, defendants admit that plaintiffs were advised by BRAC by letters of March 1, 1971, that their employment with Western would be terminated if they refused to pay BRAC an initiation fee and monthly dues and that examples of those letters are attached to the complaint and marked Exhibit D. Except as otherwise expressly admitted, defendants allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 10, and, placing their denial on that ground, deny each and every such allegation.

8. In answer to the allegations of paragraph 11, defendants admit said allegations.

9. In answer to the allegations of paragraph 12, defendants admit that plaintiffs have declined to sign applications for membership in BRAC, that plaintiffs have paid agency shop fees in amounts equivalent to the required BRAC initiation fees and monthly membership dues, and that plaintiffs Balian, Dean, Payne, Fontaine, and Loudin continue to pay agency shop fees in amounts equivalent to the required BRAC initiation fees and monthly membership dues. Defendants deny that plaintiffs Ellis and Sauls continue to pay the agency shop fees in amounts equivalent to the required BRAC initiation fees and monthly membership dues. In answer to the allegations of the second sentence of paragraph 12, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations and, placing their denial on that ground, deny each and every such allegation.

10. In answer to the allegations of paragraph 11, defendants admit that plaintiffs Balian, Sauls, Dean, Payne, and Fontaine have mailed letters to BRAC substantially in the form quoted in paragraph 13. Except as otherwise expressly admitted, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 and, placing their denial on that ground, deny each and every such allegation.

COUNT I

11. In answer to the allegations incorporated by reference in paragraph 14, defendants incorporate herein by reference each and every admission, denial and allegation of paragraphs 1 through 10 above.

12. In answer to the allegations of paragraph 15, defendants admit that dues and fees monies have been used in part for the activities described in sub-paragraph (c). Except as otherwise specifically admitted, defendants deny each and every allegation contained in paragraph 15.

13. In answer to the allegations of paragraph 16, defendants deny each and every such allegation.

14. In answer to the allegations of paragraph 17, defendants admit that the Railway Labor Act authorizes the designation of BRAC as exclusive bargaining agent for all employees in the collective bargaining unit in which plaintiffs are employed and empowers BRAC and Western to enter into the form of union security agreement described in paragraphs 7 and 8 of the complaint. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 17.

COUNT II

15. In answer to the allegations incorporated by reference in paragraph 18, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 10 and 12 through 14 above.

16. In answer to the allegations of paragraph 19, defendants admit that, as the statutory exclusive bargaining representative of plaintiffs, BRAC owes each of them the fiduciary duty of fair representation.

Except as otherwise exprssly [*sic*] admitted, defendants deny each and every allegation contained in paragraph 19.

COUNT III

17. In answer to the allegations incorporated in paragraph 20, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 10, 12 through 14, and 16 above.

18. In answer to the allegations of paragraph 21, defendants admit said allegations.

19. In answer to the allegations of paragraph 22, defendants deny each and every such allegation.

20. In answer to the allegations of paragraph 23, defendants admit that the dues reduction procedure set forth in paragraph 21 provides for no reduction of the initiation fees, that Article 27, Section 4(a) of the BRAC constitution provides that three and one-third cents per month from each member's dues shall be applied to the Legislative Fund Account (Grand Lodge), and that Article 23, Section 4(b) of the BRAc constitution authorizes each State Legislative Committee to levy against each member in the state a levy of not less than thirty cents per month for the transaction of its business, and that this amount is paid from each member's monthly dues. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 23.

21. In answer to the allegations of the Conclusion, defendants deny each and every such allegation.

COUNT IV

22. In answer to the allegations incorporated in paragraph 24, defendants incorporate herein by this reference each and every admission, denial, and allegation of paragraphs 1 through 10, 12 through 14, 16, and 18 through 20 above.

23. In answer to the allegations of paragraph 25, defendants admit that, at the Convention in 1967, a dues reduction procedure was adopted as part of the dues structure and was set forth in the constitution as amended at the said Convention. Defendants further admit that a copy

of a portion of the proceedings from the 1967 Convention is attached as Exhibit F to the amended complaint. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 25.

24. In answer to the allegations of paragraph 26, defendants admit that, at the Convention in 1971, the dues reduction procedure was revised and that the procedure was set forth in the constitution as amended at the 1971 Convention. Defendants further admit that a copy of a portion of the proceedings of the 1971 Convention is attached as Exhibit C to the amended complaint. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 26.

25. In answer to the allegations of paragraph 27, defendants admit that, under Article 34, Section 1 of the BRAC constitution, constitutional amendments may be accomplished at a convention and by referendum. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 27.

26. In answer to the allegations of paragraph 28, defendants admit that their International President issued a Policy Statement, a copy of which is attached as Exhibit I to the amended complaint; that Article 13, Section 2 of the BRAC constitution provides in part that the International President shall "enforce strict observance of the Constitution, laws, rules and regulations of the Brotherhood."; that Article 13, Section 3 provides in part that the International President "shall at all times strictly enforce the Grand Lodge Constitution, Statutes For The Government Of Lodges, Protective Laws, and T.C. Division By-Laws of the Brotherhood and shall call to account any member or members of the Brotherhood violating the same."; that Article 13, Section 4 of the BRAC constitution provides that the International President "shall have sole power and authority to interpret the Constitution and laws, subject to appeal to the Executive Council, and shall advise the membership through RAILWAY CLERK/interchange of any such interpretations issued, and may issue dispensation not inconsistent with said Constitution and laws."; and that Article 5, Section 2(a) of the BRAC constitution provides in part that:

> "It is the obligation and responsibility of every officer, subordinate unit and member to comply with the Constitution, Statutes For The Government of Lodges, Protective Laws and T.C. Division By-Laws of this Brotherhood and the orders of its officers when in conformity therewith. . . ."

Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 28.

27. In answer to the allegations of paragraph 29, defendants deny each and every said allegation.

28. In answer to the allegations of paragraph 30, defendants admit that plaintiffs propounded interrogatories on January 21, 1974; that on January 24, 1974 the Policy Statement was issued effective January 1, 1974; that International President Dennis sent a copy of the Policy Statement to each member of the Executive Council for his approval and instructed each member by letter that "It is imperative that prompt action be taken on this matter and that your approval or disapproval be received before February 1, 1974."; and that by letter dated February 14, 1974, International President Dennis instructed all Local Lodge financial secretary-treasurers in the United States to mail copies of the Policy Statement to agency fee payers for whom the Grand Lodge did not have correct addresses and that, as part of these instructions, International President Dennis stated "This matter should take precedence over any other duty you may have as Financial Secretary-Treasurer of your Lodge." Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 30.

29. In answer to the allegations of paragraph 31, defendants deny each and every said allegation.

30. In answer to the allegations of paragraph 32, defendants admit the allegation in sub-paragraph B that the Policy Statement, on its face, does not encompass payments plaintiffs are compelled to make in the form of initiation fees and assessments; defendants admit the allegation of sub-paragraph G that the persons serving on the Appeals Committee of the Convention are appointed by BRAC's International President subject to ratification by the Convention; defendants admit the allegations of sub-paragraph H that no time limitations are provided in the Policy Statement and that conventions are scheduled four years apart; defendants admit the allegations of sub-paragraph I that International President Dennis has stated that plaintiffs may not be represented on appeal by an attorney, unless such attorney is a BRAC member, and that International President Dennis has stated that there are only approximately fifteen to twenty-five such attorneys in the United States who do not serve in a representative capacity for the union, which has approximately 200,000 members in the United States; defendants admit that

sub-paragraphs (1) through (4) of sub-paragraph K correctly summarize some of the provisions of the Policy Statement and further admit the allegations of sub-paragraph (5) of sub-paragraph K except for the last sentence of said sub-paragraph; defendants admit the allegations of sub-paragraph (L) insofar as that sub-paragraph alleges that the International President has stated that all expenses incurred by an objector in his appeal must be borne by the objector, even if he succeeds in his appeal; defendants admit the allegation of sub-paragraph M that paragraph 8 of the Policy Statement has the effect of stating that members only may initially object during the first thirty days of their membership, while appearing to deny a similar right to agency payers during the initial thirty days of their agency fee status, but defendants allege that any such difference in treatment between members and agency payers was unintentional.

Except as otherwise expressly admitted, defendants deny each and every allegation of paragraph 32 and its sub-paragraphs.

31. In answer to the allegations of paragraphs 33, 34, and 35, defendants deny each and every said allegation.

AS AND FOR THEIR FIRST AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

32. The amended complaint fails to state a claim upon which relief can be granted in Count I, Count II, Count III, or Count IV, or any of them.

AS AND FOR THEIR SECOND AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

33. Plaintiffs have failed to attempt to exhaust internal and administrative remedies available to them.

AS AND FOR THEIR THIRD AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

34. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 337, subdivision (1).

AS AND FOR THEIR FOURTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

35. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 338, subdivision (1).

AS AND FOR THEIR FIFTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

36. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 343.

AS AND FOR THEIR SIXTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

37. Insofar as the amended complaint and Counts I, II, III, and IV, and each of them, allege a claim arising out of the interpretation or application of the collective bargaining agreement between BRAC and Western Air Lines, said amended complaint and Counts I, II, III, and IV, and each of them, are preempted by the provisions of the Railway Labor Act, 45 U.S.C., Section 184, and within the exclusive jurisdiction of the System Board of Adjustment.

WHEREFORE, defendants pray:

(1) That plaintiffs, and each of them, take nothing by their action;

(2) For costs of suit incurred herein; and

(3) For such other and further relief as the Court deems just and proper.

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and ROTHSCHILD
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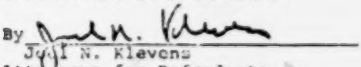
By 
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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ALLEN FAILS, JACK FROST, TWILA JOHNSON, BRENT ERKMAN, HELENE TAYLOR, CANDICE BROWN, GAYLE NELSON, JANIS DAMANTE, AUDREY RYAN, MARY ANN GROTE, SHIRLEY BALLARD, LOA YOUNG, MARGUERITE DOUGLAS, JOYCE EMMINGER and KENNETH WISOR,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES SYSTEM BOARD OF ADJUSTMENT NO. 451, AIR TRANSPORT DIVISION; CALIFORNIA STATE LEGISLATIVE COMMITTEE of the BROTHERHOOD OF RAIL-

No. 73-118-S

COMPLAINT FOR JUDGMENT, MONETARY DAMAGES AND INJUNCTIVE RELIEF

WAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; SKYLINER LODGE LOCAL 3001; SKYHARBOR LODGE LOCAL 3014; and ARROWLINER LODGE LOCAL 3049,

Defendants.

1. This Court has jurisdiction over this matter by virtue of Title 28, United States Code, § 1337, and Title 45, United States Code, § 151, et seq. The questions presented herein arise under the Constitution and laws of the United States.

2. Plaintiffs are citizens of the United States, residents of the State of California, and are employed by Western Air Lines, Inc. (hereinafter "Western") at various locations in the State of California, including Los Angeles, San Francisco, and San Diego.

3. Defendants Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, and its subsidiary organizations System Board of Adjustment No. 451, Air Transport Division, Skyliner Lodge Local 3001, Skyharbor Lodge Local 3014 and Arrowliner Lodge Local 3049 (hereinafter collectively referred to as "BRAC") are unincorporated associations and labor organizations whose purpose, in part, is the representation of employees for collective bargaining over wages, hours, and working conditions within the meaning of Section Two of the Railway Labor Act, 45 U.S.C. § 151 et seq.

4. Defendant California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter "the Committee"), is an unincorporated association, subsidiary to and affiliated with BRAC, which has as its purpose, in part, the sponsorship of political candidates, causes and legislation in the State of California, and these activities are supported financially by a substantial amount of funds derived from the compulsory dues and fees exacted from plaintiffs and the class they represent.

5. Western Air Lines, Inc. is a corporation authorized to and doing business in the State of California, engaged in the transportation of passengers and freight in interstate commerce.

6. At all times material hereto, Western has maintained a collective bargaining relationship with BRAC governing the terms and conditions of employment of plaintiffs and other members of the class they represent, as described below. BRAC was and is the exclusive bargaining agent for the craft or class of employees in which plaintiffs and the class they represent are employed.

7. The collective bargaining agreement applicable at all times pertinent hereto includes a provision executed by BRAC and Western on October 27, 1966 making union membership obligatory for all new employees, and requiring BRAC members to maintain their membership. A copy of this provision is attached hereto, marked Exhibit A, and incorporated herein by reference.

8. Under the terms of the aforesaid agreement employees hired prior to October 27, 1966 were not required to join BRAC or make payments to it. However, by a separate letter agreement of that date, Western agreed to compel such employees to join BRAC at such time as BRAC was able to demonstrate a membership level of 85% of the bargaining unit. By a letter agreement of February 26, 1971, BRAC and Western implemented and modified the October 27, 1966 agreement. Those agreements are attached hereto, respectively marked Exhibit B and Exhibit C, and incorporated herein by reference.

9. The agreements compelling union membership or the payment of initiation fees and dues, referred to in paragraphs 7 and 8 above, are hereinafter collectively referred to as the "compulsory union membership agreement."

10. By letters of March 1, 1971 and March 4, 1971, plaintiffs and the class they represent were advised by BRAC and Western that their employment with Western would be terminated if they refused to pay BRAC an initiation fee and monthly dues. Examples of those letters are attached hereto, respectively marked Exhibit D and Exhibit E, and incorporated herein by reference.

11. By the terms of the compulsory union membership agreement and other provisions of the collective bargaining agreement, Western has obligated itself to enforce such provisions against employees declining to pay union dues and fees, by threatening or effecting their termination. Plaintiffs and the class they represent have been advised by responsible representatives of Western and BRAC that they will be similarly

discharged from employment if they fail or refuse to pay the BRAC initiation fees and dues.

12. Certain of the plaintiffs and the class they represent were induced to obtain formal membership in BRAC by reason of written and oral misrepresentations made to them by officials and agents of BRAC, and by Western officials in behalf of BRAC, that unless they became union members they would be subject to discharge from their employment under provisions of the compulsory union membership agreement, and they were not advised that they could decline union membership and pay agency fees in lieu thereof. All of the plaintiffs and the class they represent, are union members and are involuntary dues and fee payers.

13. Plaintiffs are members and representatives of a class of Western employees, each of whom has advised BRAC of his specific objection to the exaction of dues for political purposes and for all other purposes not directly related to collective bargaining. Such objections were stated in substantially the following form:

> As an employee of Western Air Lines, I feel that the Brotherhood of Railway, Airline and Steamship Clerks does not properly represent my interests and I protest the compulsory "agency fee" I must pay the Brotherhood of Railway, Airline and Steamship Clerks, in order to retain my job. In addition, I hereby protest the use of these fees for any purpose other than the cost of collective bargaining and specifically protest the support of legislative goals, candidates for political office, political efforts of any kind or nature, ideological causes, and any other activity which is not a direct cost of collective bargaining on my behalf. I demand an accounting and refund from the Brotherhood of Railway, Airline and Steamship Clerks of all fees exacted from me by the so-called "agency fee".

Their payment of fees and dues to BRAC is based solely upon threatened termination of employment.

14. The class represented by plaintiffs numbers in excess of one hundred seventy (170) persons, making it impractical for each to participate in this action as a named plaintiff.

15. BRAC has refused to accept some of the objection letters sent by plaintiffs and the class they represent, although they were properly addressed, with postage prepaid, and the postal authorities attempted to accomplish their delivery.

16. Questions of law and fact relative to the collection, transmission and expenditure of fees and dues payments are common to all members of the class in every respect; the questions of fact with respect to the expenditures by BRAC described in paragraph 24, infra, are identical to all members of the class.

17. The claims of the plaintiffs are typical of the entire class, differing only with respect to the amounts of forced payments, based upon the duration of the individual class member's employment.

18. The prosecution of separate actions by individual class members could create inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the union defendants, in that different courts or juries might reach different determinations with respect to their activities within the category of prohibited expenditures, consisting of all such expenditures objected to by the class members for purposes not related to collective bargaining, nor to the adjustment and settlement of grievances and disputes. The prosecution of separate actions by individual members of the class would also create a risk of adjudication with respect to individual members of the class which would also create a risk of adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications in that a decision against the claims of some members of the class might as a practical matter make it impossible for other members of the class to recover on account of their claims since they are essentially similar.

19. Defendant BRAC has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief and declaratory relief with respect to the class as a whole in that BRAC has opposed the claims of all members of the class in every respect.

20. The questions of law or fact common to the members of the class predominate over questions affecting only individual members, in that the important and controlling questions of law and fact are common to all members of the class.

21. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. As appears from the allegations heretofore made with respect to the similarity of the questions of law and fact involved in all of the claims, the determination of the

claims in a single action would be conducive of greater efficiency and economy in the operation of the courts than would numerous separate suits. The amount of money involved in the case of each individual's claim would make it burdensome for the claimants to maintain separate actions. There is not now pending any other litigation concerning this controversy.

22. The named plaintiffs will fairly and adequately protect the interests of the class.

Count I

23. Plaintiffs reiterate and reallege all of the allegations set forth in paragraphs 1 through 22 above.

24. The compulsory dues and fees exacted from plaintiffs and members of the class under the aforesaid compulsory union membership agreement have been used and are being used in substantial amounts by BRAC and the Committee over the objections of plaintiffs and the class they represent, for the following illegal and improper purposes:

(A). To support by direct and indirect financial contributions and expenditures the political campaigns of candidates for public office, including the offices of President and Vice-President of the United States, Senate and House of Representatives of the United States, and various state and local offices; many, if not all, of such candidates being opposed by plaintiffs and the class they represent.

(B). To propagate political and economic doctrines, concepts, ideologies, and legislative programs which are opposed by plaintiffs and the class they represent, thereby imposing upon them conformity to those doctrines, concepts, ideologies and programs.

(C). To cover the cost of publications, convention expenses, strike benefits, contributions to organizations and individuals, recreational activities, a death benefit plan and various other programs.

The foregoing expenditures are not reasonably necessary to the negotiation and administration of collective bargaining agreements, or the adjustment and settlement of grievances and disputes, nor are they necessary or germane to the representation of plaintiffs and the class they represent. Such expenditures have been accompanied by BRAC's use of its officers, employees, representatives and facilities, with attendant

expense, to support or oppose particular candidates or legislation and to conduct voter registration drives and "get out the vote" campaigns among persons thought to be favorably inclined to BRAC sponsored or endorsed candidates.

25. The exaction of dues and fees from plaintiffs and the class they represent under threatened loss of their employment, and the use of such payments for the purposes stated above, imposes upon them political and ideological conformity, prevents them from exercising their rights and privileges as citizens of the United States, deprives them of their civil rights guaranteed to them under statutes of the United States, injures them in their person and property, and abridges rights guaranteed to them under the First, Fifth and Ninth Amendments of the United States Constitution; which Amendments guarantee to individuals freedom of association, freedom of thought, freedom of speech, freedom of political action, freedom to pursue the occupations of their choice, freedom from unwarranted invasion of their privacy, and other fundamental personal rights and liberties.

26. The aforesaid deprivation and abridgement of the statutory and constitutional rights of plaintiffs and their class is accomplished by BRAC through its collective bargaining agreement with Western, acting under authority of the Railway Labor Act, 45 U.S.C. § 151, et seq. The Railway Labor Act authorizes the designation of BRAC as exclusive bargaining agent for all employees in the collective bargaining unit in which plaintiffs and the class they represent are employed, and empowers BRAC and Western to enter into the form of compulsory union membership agreement described above.

Count II

27. Plaintiffs reiterate and reallege all of the allegations of paragraphs 1 through 22 and 24 through 26.

28. As the statutory exclusive bargaining representative of plaintiffs and the class they represent, BRAC owes each of them the fiduciary duty of fair representation, but has wilfully and persistently breached this duty, and breached and implied condition of the collective bargaining agreement by expending a substantial portion of their dues and fees for purposes not reasonably related to the negotiation and administration of collective agreements nor to the adjustment and settlement of grievances and disputes. Such expenditures are not in furtherance of BRAC's

legitimate objectives and obligations as collective bargaining representative of plaintiffs and the class they represent; and BRAC's continuing diversion and conversion of their funds is arbitrary, in bad faith, and constitutes hostile discrimination against plaintiffs and the class they represent.

Count III

29. Plaintiffs reiterate and reallege all of the allegations of paragraphs 1 through 22, 24 through 26, and 28.

30. BRAC has established an internal procedure whereby persons who object to use of their monthly dues for political purposes may register that objection and reduce the amount of monthly dues payments. This provision is set forth in Article 27 of the BRAC Constitution, and has existed in substantially the following form at all times material hereto:

> Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one third cents (3 1/3 ¢) per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

31. BRAC has arbitrarily, in bad faith, and with hostile discrimination denied participation in this procedure to plaintiffs and the class they represent. BRAC has breached its fiduciary duty by:

> (A). Refusing to accept some properly addressed, postage paid communications expressing objection to political expenditures, and requesting a refund; and
>
> (B). By refusing in every other instance to acknowledge receipt of notification of its members' objections to political expenditures.

32. The dues reduction procedure set forth in paragraph 30, even if it were available to plaintiffs and the class they represent is illegal, arbitrary, and discriminatory in its structure and operation for the following reasons:

> (A). It provides for no reduction of the initiation fees, yet plaintiffs aver upon knowledge and belief that a substantial

amount of revenue BRAC derives from such fees is used for political and ideological purposes.

(B). The amount of dues reduction (3 1/3 cents per month) is patently unrelated to the extent of prohibited expenditures. Two examples follow:

1. Article 27, Section 4(a) of the BRAC Constitution provides that 3 1/3 cents per month from each member's dues shall be applied to the "Legislative Fund Account (Grand Lodge)."

2. Article 27, Section 4(b) of the BRAC Constitution authorizes each State Legislative Committee to levy against each member in the state a levy "*of not less than thirty cents*" per month for "the transaction of its business." (Emphasis added). This amount is paid from each member's monthly dues. Such levies affect plaintiffs and the class they represent.

(C). No procedure is afforded objecting members by which they may ascertain the true relationship between prohibited spending and the miniscule amount of the dues reduction.

(D). Plaintiffs are informed and believe, and therefore aver, that the amounts of money expended by BRAC for political and ideological purposes and other purposes not germane to collective bargaining are greatly in excess of the amount by which a dues reduction may be allowed under the aforesaid procedure.

CONCLUSION

Plaintiffs and the members of the class they represent have no adequate remedy at law for the harm and damage resulting from the acts and conduct of defendants, as hereinabove alleged, because of their prospective loss of their employment, the loss of their seniority rights, the loss or diminution of their respective trade skills during any prolonged period away from their jobs and because they are and will be deprived of their liberty and property without due process of law in violation of their rights under the First, Fifth and Ninth Amendments of the United States Constitution. Irreparable harm, damage and injury will be done to plaintiffs and the members of their class unless the acts and conduct of defendants above complained of are permanently enjoined.

WHEREFORE, plaintiffs pray:

1. That the Court enter an order determining that this action may be maintained as a class action;

2. That the Court direct the best practicable notice to the class, including individual notice to each member, and that such notice shall advise each member that: (a) the Court will exclude him from the class if he so requests by a specified date; (b) the judgment whether favorable or not will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he so desires, enter an appearance through his counsel;

3. For a declaratory judgment holding that the herein described compulsory union membership agreement by its form, and in its operation and effect denies and abridges the statutory and constitutional rights of plaintiffs and the class they represent;

4. For an order requiring BRAC to account to plaintiffs, and each of them, and to the members of the class they represent, for all sums exacted from them pursuant to the above-mentioned collective bargaining agreement; to account in detail for the allocation, expenditure and disposition of said funds; to include in said accounting the indentity of the recipients, corporate, associate, partnership, individual or otherwise, as the case may be, of said funds;

5. For a permanent injunction restraining BRAC from enforcing as against plaintiffs, or as against any members of the class they represent, the compulsory union membership agreement provisions of the collective bargaining agreement described herein, insofar as such provisions are used for purposes unrelated to the negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes;

6. That BRAC be required to communicate to all employees within the bargaining unit which includes plaintiffs that: (1) they are not required to obtain or maintain formal membership in BRAC as a condition of securing or maintaining employment with Western Air Lines; (2) they may protest the use of their dues and fees for purposes other than the negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes, and that if they do protest, their dues and fees will be accordingly reduced or refunded.

Further, that defendant BRAC be required to establish a procedure for an accurate correlation of the dues reduction or refund to amounts actually expended by it for purposes unrelated to collective bargaining or the settlement of disputes; and if a refund procedure is utilized, that it ensure prompt return of such funds;

7. For a judgment allowing plaintiffs and the class they represent monetary damages for injuries sustained as a result of defendants' unlawful and unwarranted interference with and deprivation of their constitutional, civil, statutory and contractual rights.

8. For attorneys' fees, costs, and for such other and further relief as the Court may deem just and proper.

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

By _____
Michael E. Merrill

By _____
Raymond J. LaJeunesse, Jr.

GIBSON & KENNERSON

By _____
Jonathan C. Gibson

GALL, LANE, POWELL & KILCULLEN

By _____
John L. Kilcullen

Attorneys for Plaintiffs

EXHIBIT A

This Agreement is made by and between Western Air Lines, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, in accordance with the provisions of the Railway Labor Act, as amended.

(1) Each employee in a classification under the basic Agreement who is a member of the Union on the effective date hereof and each such employee who becomes a member after such date, shall, as a condition of employment, maintain membership in good standing in the Union.

(2) Each employee hired in a job classification under this Agreement after the effective date hereof shall, after completion of his/her sixtieth (60th) day of employment, acquire and maintain membership in the Union.

(3) Membership in the Union means the employee has tendered payment of initiation fees and regular monthly dues uniformly required by the applicable constitutional provisions of the Union for employees of like status and in accordance with the Railway Labor Act, as amended.

(4) It is understood and agreed that the requirements of Paragraphs (1) and (2) do not apply to employees to who membership is not available under the same terms and conditions as are generally applicable to other employees of like status.

(5) Employees required under this Agreement to maintain membership in the Union who are transferred or assigned to job classifications outside the basic Agreement, employees on leave of absence without pay for a period of excess of thirty (30) days, and employees on furlough shall not, during such periods, be required to maintain membership in the Union provided, however, upon return from leave, furlough or assignment or transfer to a job classification under the basic Agreement such employee must reinstate his membership within thirty (30) days.

(6) Employees required under this Agreement to acquire and/or maintain membership in the Union and who fail therein are subject to termination in accordance with the following provisions:

a. The General Chairman will notify the employee in writing of his failure to comply with the provisions of this Agreement and afford to

such employee the opportunity to comply, or if he disputes the charge that he has failed to comply, he shall be given the opportunity of a hearing with the General Chairman to verify the applicable facts.

b. If the facts show the employee has not complied with this Agreement and the employee has not, within fifteen (15) days thereafter, taken steps to comply, the General Chairman may notify the Company in writing that such employee is not entitled to continue in employment. Such notice should be sent to the Director-Labor Relations, with a copy to the employee.

c. Upon receipt of such notice, the Company will, within five (5) days, send to the employee a notice of termination which shall become effective three (3) weeks from the date of mailing, subject to Paragraph (8) hereof.

d. If the employee disputes the charge of noncompliance, he may appeal directly to the Director-Labor Relations. In this event, a hearing shall be held in the same manner as any other grievance and all time limits for decision and appeal shall apply.

e. It is understood and agreed that (1) the Company will not send a termination notice as sent forth in Paragraph (6)c in a disputed case until a final decision has been reached, and (2) at any time prior to termination, the employee may tender the necessary dues and/or initiation fees.

(7) An employee terminated at the request of the General Chairman under this Agreement shall be deemed to have been discharged for cause and the Company shall not be liable for any wages or pay claims of any type from such employee. In the event of a court judgment to the effect the discharge was improper, the Union hereby agrees to hold the Company harmless and will reimburse the Company for any costs whatsoever involved.

(8) In any event, it is agreed the Company will not be required to terminate any employee under this Agreement until the services of a qualified replacement is available.

(9) The Company agrees that upon receipt of a properly executed Authorization for Payroll Deduction, it will make a single monthly deduction from an employee's earnings, after other deductions

authorized by the employee or required by law have been made, to cover his current standard monthly Union dues uniformly levied in accordance with the constitution and by-laws of the Union, as set forth in the Railway Labor Act.

(10) Any Authorization for Payroll Deductions under this Letter of Agreement shall be effective two (2) weeks following its receipt by the Company's Payroll Department at the Company's General Office in Los Angeles, and shall apply to the next pay check from which dues deduction is made.

(11) The Company will remit to the designated Union office a check in payment of all dues collected as soon as practicable after the payday on which deductions were made.

(12) Collection of back dues, dues not deducted because of insufficient current earnings, dues missed because of clerical error or dues missed due to delay in receipt of the Authorization for Payroll Deductions shall be the responsibility of the Union and not subject to payroll deduction.

(13) In the event the amount of the standard dues uniformly levied are changed, it shall be the sole responsibility of the employee and the Union to notify the Company and to make any necessary adjustments between themselves of amounts deducted from the employee's earnings. So far as the Company is concerned, any such changes shall be made in accordance with the time limits set forth in Paragraph (10) of this Letter of Agreement.

(14) An Authorization for Payroll Deduction under this Letter of Agreement once executed and delivered to the Company shall be irrevocable for the term of the basic Agreement or for a period of one (1) year, whichever is the lesser, and shall renew itself for successive yearly or applicable periods thereafter unless the employee serves written notice on the Company to revoke such Authorization for Payroll Deduction at least sixty (60) days and not more than seventy-five (75) days prior to any periodic renewal date, provided, however, an Authorization for Payroll Deduction shall automatically be revoked if:

a. The employee transfers to a position with the Company not covered by the basic Agreement between the parties.

b. The employee's services with the Company are terminated.

c. The Union ceases to represent the employees covered under this Agreement.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement this 27th day of October, 1966.

FOR THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERDS [*sic*], FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES	FOR WESTERN AIR LINES, INC.
/s/ Lyle McKinney	/s/ Terrell S. Shrader
/s/ Richard R. Calkins	/s/ Philip E. Peirce
/s/ Robert L. Dennis	/s/ Dan A. Zaich

EXHIBIT B

WESTERN AIR LINES, INC.
LOS ANGELES INTERNATIONAL AIRPORT
6060 AVION DRIVE
LOS ANGELES, CALIFORNIA 90009

October 27, 1966

Mr. Lyle McKinney
General Chairman
Brotherhood of Railway Clerks
Suite 526, Airport Office Building
8939 South Sepulveda Boulevard
Los Angeles, California 90045

Dear Mr. McKinney;

This will confirm to you my commitment to grant to the employees as represented by the Air Transport Division of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees a Union Shop Agreement upon request and a showing that at least 85% of the employees covered are members in good standing.

Very truly yours,

/s/
TERRELL S. SHRADER

TSS:lm

EXHIBIT C

LETTER OF AGREEMENT

This Letter of Agreement is made and entered into by and between Western Air Lines and the Brotherhood of Railway and Airline Clerks.

The parties hereto agreed as follows:

(1) Paragraph (1) of the Letter of Agreement dated October 27, 1966 will be amended to read as follows:

> "Each employee in a classification under the basic agreement will be required to acquire and maintain membership in the Union except that each employee hired prior to October 27, 1966 who desires to maintain employment with Western but does not desire membership in the Union may, instead of acquiring membership, tender to the Union a service charge equal to the initiation fee and monthly dues that uniformly imposed on Union members."

(2) Employees who fail to meet the provisions of Paragraph (1) of this Letter of Agreement within sixty (60) days of the date of this letter are subject to termination in accordance with the provisions of the Letter of Agreement dated October 27, 1966.

This Letter of Agreement is signed this 26th day of February, 1971.

FOR THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS

FOR WESTERN AIR LINES, INC.

APPROVED BY:

EXHIBIT D

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
AFL—CIO—CLC SYSTEM BOARD OF ADJUSTMENT NO. 451

AIR TRANSPORT DIVISION

March 1, 1971

Dear Non-Members - Western Airlines:

On February 26, 1971, BRAC and Western Airlines entered into Agreement whereby each employee in a classification under the basic agreements will be required to obtain and maintain membership in the Union, except that each employee hired prior to October 27, 1966 who desires to maintain employment with Western, but does not desire membership in the Union may, instead of acquiring membership, tender to the Union a service charge equal to the initiation fee and monthly dues which are uniformly imposed on Union members.

Employees who fail to meet the provisions of this Agreement within 60 days from the date of signing of said Agreement, are subject to termination in accordance with the provisions of the Letter of Agreement dated October 27, 1966.

The purpose of this letter is to make it convenient for you to fulfill your obligation to join the Union. Please be advised that you should tender the initiation fee of $10.00 and one month's dues of $6.50. In the event that you were a member of the Union prior to October 27, 1966, you should instead, tender a reinstatement fee of $15.00 and one month's dues of $6.50.

We are enclosing for your convenience, an application for membership and dues check-off form which should be completed by you and returned to us with the fees before April 27, 1971.

Very truly yours,

William H. Grant
General Chairman

EXHIBIT E

Western Airlines

March 4, 1971

TO WHOM IT MAY CONCERN:

In October of 1966, the Company and the BRAC signed a Maintenance of Membership Agreement which provided that any employee who at that time was a member of the Union or who was hired after 10/27/66 would be required to acquire and maintain membership. In addition, the Company agreed that at such time as 85% of the employees covered by the Agreement became members of the Union, the remaining 15% would be required to become members. As of 2/22/71, 85% of the employees covered by the Agreement are Union members.

This letter is to advise you that you are now subject to a Letter of Agreement signed on 2/26/71 which provides that you will be required to acquire and maintain membership in the Union; however, if you do not desire membership you may instead tender to the Union a service charge equal to the initiation fee and monthly dues that are uniformly imposed on Union members. This obligation must be met within 60 days (by April 26) or you will be subject to termination in accordance with the provisions of the Letter of Agreement dated 10/27/66. Within the next few days the Union will be contacting you directly concerning this obligation.

R. S. Neel, Jr.
Vice President, Service (Line)

BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
GEORGE E. BODLE
STEPHEN REINHARDT
JOEL N. KLEVENS
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WILLIAM J. DONLON
6300 River Road
Rosemont, Illinois 60018
(312) 692-7711

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALLEN FAILS, JACK FROST, TWILA JOHNSON, BRENT ERKMAN, HELENE TAYLOR, CANDICE BROWN, GAYLE NELSON, JANIS DAMANTE, AUDREY RYAN, MARY ANN GROTE, SHIRLEY BALLARD, LOA YOUNG, MARGUERITE DOUGLAS, JOYCE EMMINGER and KENNETH WISOR, Plaintiffs, vs. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES	CIVIL NO. 73-118-N FIRST AMENDED ANSWER TO COMPLAINT

SYSTEM BOARD OF ADJUSTMENT NO. 451, AIR TRANSPORT DIVISION; CALIFORNIA STATE LEGISLATIVE COMMITTEE of the BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; SKYLINER LODGE LOCAL 3001; SKYHARBOR LODGE LOCAL 3014; and ARROWLINER LODGE LOCAL 3049,

Defendants.

Defendants BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES SYSTEM BOARD OF ADJUSTMENT NO. 451, AIR TRANSPORT DIVISION; CALIFORNIA STATE LEGISLATIVE COMMITTEE OF THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; SKYLINER LODGE LOCAL 3001; SKYHARBOR LODGE LOCAL 3014; and ARROWLINER LODGE LOCAL 3049 (hereinafter collectively referred to as "BRAC"), for answer to the Complaint on file herein admit, deny and allege as follows:

1. In answer to the allegations of paragraph 1, defendants deny each and every allegation contained in said paragraph.

2. In answer to the allegations of paragraphs 2 and 3, defendants admit the allegations contained therein.

3. In answer to the allegations of paragraph 4, defendants admit that the California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes is an unincorporated association, subsidiary to and affiliated with the BRAC, that the Committee has as its purpose, in part, the sponsorship of legislation in the state of California, and that the Committee's activities are supported financially by thirty cents per month from the compulsory dues and fees paid by plaintiffs and others. Except as otherwise expressly admitted, defendants specifically deny

each and every allegation of paragraph 4. Defendants further deny that plaintiffs, or any of them, do or can represent any class.

4. In answer to the allegations of paragraph 5, defendants admit the allegations contained therein.

5. In answer to the allegations of paragraph 6, defendants admit that, at all times material hereto, Western has maintained a collective bargaining relationship with BRAC governing the terms and conditions of employment of plaintiffs and that BRAC was and is the exclusive bargaining agent for the craft or class of employees in which plaintiffs are employed. Defendants deny that plaintiffs, or any of them, do or can represent any class, and, except as otherwise expressly admitted, defendants specifically deny each and every allegation of paragraph 6.

6. In answer to the allegations of paragraphs 7 and 8, defendants admit that the agreements attached to the complaint as Exhibits A, B, and C are agreements executed by BRAC and Western and that said agreements set forth terms and conditions relating to the obligations of employees with respect to BRAC. Except as expressly admitted, defendants deny each and every allegation of paragraphs 7 and 8.

7. In answer to the allegations of paragraph 9, defendants admit that plaintiffs refer in their complaint to the union security provisions of the collective bargaining agreement as "compulsory union membership agreement."

8. In answer to the allegations of paragraph 10, defendants admit that plaintiffs Emminger, Wisor, Young, Taylor, Douglas, and Fails were advised by BRAC that their employment with Western would be terminated if they refused to pay BRAC an initiation fee and monthly dues. Defendants further admit that the aforesaid plaintiffs were so advised by a letter dated March 1, 1971, an example of which is attached to the Complaint as Exhibit D. In answer to the allegation that Western advised plaintiffs and the class they purport to represent that their employment with Western would be terminated if they refused to pay BRAC an initiation fee and monthly dues, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations and, placing their denial on that ground, deny each and every such allegation. Defendants further deny that plaintiffs do or can represent any class, and, except as expressly admitted, defendants deny each and every allegation of paragraph 10.

9. In answer to the allegations contained in the first sentence of paragraph 11, defendants admit the allegations contained therein. In answer to the allegations contained in the second sentence of paragraph 11, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations and, placing their denial on that ground, deny each and every such allegation. Defendants further deny that plaintiffs do or can represent any class, and, except as expressly admitted, defendants deny each and every allegation of paragraph 11.

10. In answer to the allegations of paragraph 12, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, placing their denial on that ground, deny each and every such allegation.

11. In answer to the allegations of paragraph 13, defendants admit that plaintiffs Taylor, Brown, Nelson, Ryan, Grote, Young, Douglas, Emminger, and Wisor mailed to defendants a letter substantially in the form quoted in paragraph 13. Except as otherwise expressly admitted, defendants allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 13 and, placing their denial on that ground, deny each and every such allegation. Defendants further deny that plaintiffs are members and representatives of a class of Western employees.

12. In answer to the allegations of paragraph 14, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, placing their denial on that ground, deny each and every such allegation. Defendants further deny that plaintiffs do or can represent any class.

13. In answer to the allegations of paragraph 15, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, placing their denial on that ground, deny each and every such allegation.

14. In answer to the allegations of paragraphs 16, 17, 18, 19, 20, 21, and 22, defendants deny each and every such allegation.

COUNT I

15. In answer to the allegations incorporated by reference in

paragraph 23 of the Complaint, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 14 above.

16. In answer to the allegations of paragraph 24, defendants admit that dues and fees moneys have been used in part for the activities described in sub-paragraph (C). Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 24.

17. In answer to the allegations of paragraph 25, defendants deny each and every allegation contained therein.

18. In answer to the allegations of paragraph 26, defendants admit that the Railway Labor Act authorizes the designation of BRAC as exclusive bargaining agent for all employees in the collective bargaining unit in which plaintiffs are employed, and empowers BRAC and Western to enter into the form of union security agreement described in paragraphs 7 and 8 of the Complaint. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 26.

COUNT II

19. In answer to the allegations incorporated by reference in paragraph 27, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 14 and 16 through 18 above.

20. In answer to the allegations of paragraph 28, defendants admit that, as the statutory exclusive bargaining representative of plaintiffs, BRAC owes each of them the fiduciary duty of fair representation. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 28.

COUNT III

21. In answer to the allegations incorporated by reference in paragraph 29, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 14, 16 through 18, and 20 above.

22. In answer to the allegations of paragraph 30, defendants admit

each and every such allegation.

23. In answer to the allegations of paragraph 31, defendants deny each and every such allegation.

24. In answer to the allegations of paragraph 32, defendants admit that the dues reduction procedure set forth in paragraph 30 provides for no reduction of the initiation fees. Defendants further admit that Article 27, Section 4(a) of the BRAC constitution provides that three and one-third cents per month from each member's dues shall be applied to the Legislative Fund Account (Grand Lodge). Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 32.

25. In answer to the allegations of the Conclusion, defendants deny each and every allegation contained therein.

AS AND FOR THEIR FIRST AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

26. The Complaint fails to state a claim upon which relief can be granted in Count I, Count II, Count III, or any of them.

AS AND FOR THEIR SECOND AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

27. Plaintiffs, and any alleged members of the alleged plaintiffs' class, have failed to attempt to exhaust internal and administrative remedies available to them.

AS AND FOR THEIR THIRD AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

28. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 337, subdivision (1).

AS AND FOR THEIR FOURTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

29. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code

of Civil Procedure, Section 338, subdivision (1).

AS AND FOR THEIR FIFTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

30. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 343.

AS AND FOR THEIR SIXTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

31. Insofar as the Complaint and Counts I, II, and III, and each of them, allege any claim arising out of the interpretation or application of the collective bargaining agreement between BRAC and Western Air Lines, said Complaint and Counts I, II, III, and each of them, are preempted by the provisions of the Railway Labor Act, 45 U.S.C., Section 184, and within the exclusive jurisdiction of the System Board of Adjustment.

WHEREFORE, defendants pray:

(1) That plaintiffs, and each of them, take nothing by their action;

(2) For costs of suit incurred herein; and

(3) For such other and further relief as the Court deems just and proper.

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and ROTHSCHILD
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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ALLEN FAILS, et al. Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, etc., et al. Defendants.	Civil No. 73-118-N AMENDMENT TO COMPLAINT

Plaintiffs and class members amend their complaint herein as follows:

Count IV

33. Plaintiffs reiterate and reallege all of the allegations of Plaintiffs 1 thru 22, 24 thru 26, 28, and 30 thru 32.

34. At its quadrennial convention in 1967, Defendant BRAC first adopted an ostensible dues reduction procedure, by means of a constitutional amendment. That constitutional amendment is attached hereto, marked Exhibit F, and incorporated herein by reference.

35. At its quadrennial convention in 1971, Defendant BRAC revised that dues reduction procedure, again by means of a constitutional amendment, which is attached hereto, marked Exhibit G, and incorporated herein by reference. As revised, that provision is attached hereto, marked Exhibit H, and incorporated herein by reference.

36. Under Article 34, Section 1 of the BRAC Constitution, a constitutional amendment may be accomplished only at a convention, or by a referendum.

37. Flouting the requirements imposed by the constitution of the BRAC, its International President issued a Policy Statement (attached hereto, marked Exhibit I and made a part hereof by reference) which is in fact an amendment of the BRAC Constitution by executive fiat. Such action is specifically forbidden by numerous portions of the constitution, including the following:

> Article 13, detailing the International President's duties, specifies in Section 2 that he shall ". . . *enforce strict observance of the constitution*, laws, rules and regulations of the Brotherhood."
>
> Article 13, Section 3 emphasizes this duty, providing that the International President ". . . shall at all times strictly enforce the Grand Lodge Constitution, Statutes, for the Government of Lodges, Protective Laws and T.C. Division By-Laws of the Brotherhood and shall call to account any member or members of the Brotherhood violating the same."
>
> Article 13, Section 4 authorizes the International President to interpret the Constitution and laws, but limits this authority by stating that he may ". . . issue dispensation *not inconsistent with said Constitution* and laws."
>
> Article 5, Section 2(a) provides that: "It is the obligation and responsibility of every officer, subordinate unit and member to comply with the Constitution, . . . and the orders of its proper officers *when in conformity therewith*; . . . ."
> (Emphasis supplied in the foregoing quotations).

38. The action undertaken in issuance of the Policy Statement was motivated by a fraudulent, deceitful and dishonest attempt to accomplish two objectives: (1) to conceal the nature and extent of BRAC's actual expenditure of the plaintiffs' compulsory union dues and fees, and (2) to enmesh the plaintiffs in an illusory scheme to bilk them of their right not to pay dues and fees for purposes unrelated to the negotiation and administration of collective bargaining agreements, or for the settlement of disputes and grievances.

39. One indication of defendants' motives, as evidenced in the International President's issuance of the Policy Statement, appears in the fact that plaintiffs propounded interrogatories on January 21, 1974 which sought details on defendants' spending of dues and fees; on January 24, 1974 the Policy Statement was issued with a retroactive effective date, and officers and representatives of defendants were told by International President Dennis that "It is imperative that prompt action be taken on this matter. . . ;" and that "This matter should take precedence over any other duty you may have. . . ." These instructions are contained in letters to his subordinate officers.

40. The Policy Statement is inconsistent with the constitutional provisions of Article 27 (Exhibit H), and therefore is an invalid exercise, for many reasons, including but not limited to the amount of dues reduction, the procedure whereby it may be obtained, the persons authorized by BRAC to administer it, and the categories of employees represented by the union to whom it is applicable.

41. On its face, and in its operation and effect as described by International President Dennis, the Policy Statement is arbitrary, capricious, deceptive and invidiously discriminatory for the following reasons:

A. It applies to only a limited portion of defendants' improper expenditures of plaintiffs' dues and fees.

B. On its face, it does not encompass payments plaintiffs are compelled to make in the form of initiation fees and assessments.

C. It discriminates against all members and agency fee payers who decline to execute a checkoff, in that no method is specified as to how or when they are supposed to be able to obtain a refund; and International President Dennis has stated that such procedures are not yet established, and further that they will vary from one

Local Lodge and employee group to another, depending upon the arrangements he makes with the Local Lodge officers, the form of the collective bargaining agreement under which the affected employees work, and other factors.

D. Objectors are not provided with any means to secure information by which they may refute or authenticate the determination by various BRAC officials of the amount of political spending, or other data pertinent to the operation of the Policy Statement; and International President Dennis has stated that BRAC will refuse to provide such information, even on the various levels of appeals specified.

E. The initial determination of the amount of improper spending and the review thereof at the first two appellate levels is made by those persons having a vested interest in computing it at a minimum level; those same persons actively participate in the selection of recipients and beneficiaries of improper expenditures from plaintiffs' dues and fees.

F. The International President has demonstrated hostility toward members and agency payers exercising their right to become objectors. Further, he cannot serve an impartial appellate function as he has stated that he does and will work closely with the Board of Trustees in making their initial dues reduction computation. Further, he has a conflict of interest in serving in an appellate capacity or in any way affecting the dues reduction determinations, as he is President of the Railway Clerks Political League, a political organization which is the recipient or beneficiary of a substantial amount of contributions, services, supplies, and equipment from BRAC, for which the payment or cost thereof is derived at least in part from objectors' (including plaintiffs') compulsory dues and fees. The International President therefore has a vested interest in ensuring that such contributions and services are provided at a maximum level. This conflict is intensified by the fact that 6 of the 7 members of the Railway Clerks Political League Executive Committee are members of the BRAC Executive Council, which is the second step appellate forum.

G. At the final appellate level, those persons serving the Appeals Committee of the convention are appointed by BRAC's International President, (who decided step one of the appeal) with the

ratification of the convention.

H. There is no way to determine the amount of time plaintiffs would be required to expend in pursuit of the illusory appellate procedures, as:
   (1) no time limitations are provided in the Policy Statement,
   (2) even if other appeal procedures set forth in the constitution were followed, there is no time limit within which the International President or the Executive Council must render a decision,
   (3) conventions are scheduled four years apart.

I. Plaintiffs may not be represented on appeal by an attorney, unless such an attorney is a BRAC member, and International President Dennis has revealed that there are only approximately 15-25 of such attorneys in the entire United States who do not serve in a representative capacity for the union, which has approximately 200,000 members in the United States.

J. In order to present an appeal, the objector must travel to Chicago, Illinois, headquarters of the International President, and to whatever distant city has been selected for an Executive Council meeting or a convention. All expenses incurred by the objector, including attorneys' fees (in the unlikely event he found a BRAC member-attorney willing to represent him and acceptable to the objector), travel expenses, and costs incurred in establishing his evidence of the improper determination below must be borne by the objector, even if he succeeds in his appeal.

K. The Policy Statement intentionally imposes burdensome and illogical conditions upon potential objectors to chill their exercise of their right to object to improper use of their compulsory dues and fees, and to cause those who do object to suffer a net economic loss:
   (1) Although BRAC is making known the very existence of the Policy Statement by its newspaper (second class mail) and by regular mail in some cases, objectors must incur the expense of mailing their objection by registered or certified mail.
   (2) Objectors must bear the expense of making an individual notification of their objection.

(3) Those who have in the past objected, and defendants concede having received objections from some plaintiffs and others, must send a new request via certified or registered mail in order to validate their prior objection.

(4) Defendants require objectors to make an annual renewal of their objection, by certified or registered mail.

(5) While the Policy Statement purports to grant prior objectors 90 days within which they must renew their objections, that period begins from the effective date, January 1, 1974. The Policy Statement was not issued until January 24, 1974, notification to agency fee payers was not initiated until February 14, 1974 or later, and notification to members through the union newspaper was not begun until February 27, 1974. Thus the vast number of persons subject to the Policy Statement will have less than 30 days notice, rather than the 90 days.

42. Issuance of the Policy Statement is the latest example of defendants continuing bad faith effort to oppress employees they represent, and to stifle them in the exercise of rights guaranteed them in the First, Fifth and Ninth Amendments to the United States Constitution and by the Railway Labor Act, 45 U.S.C. § 151 *et seq*. Those rights preclude defendants from compelling plaintiffs to pay dues and fees for purposes other than the negotiation and administration of collective bargaining agreements, and for the adjustment and settlement of grievances and disputes.

43. Defendants' bad faith is further exemplified by the pendency of the within action for approximately one year, during which time defendants have continued their steadfast refusal to refund dues and fees improperly spent over plaintiffs' objection.

44. Irreparable harm, damage, and injury will be done to plaintiffs unless defendants are enjoined and restrained from subjecting plaintiffs to the provisions of the Policy Statement, as they will be denied their constitutional and statutory rights as above described. Plaintiffs have no adequate remedy at law for the harm, damage, and injury suffered as a consequence of the acts and conduct of defendants.

WHEREFORE, plaintiffs pray:

1. For an order determining that the adoption of the Policy

Statement was invalid,and is void and of no effect;

2. That the Court enjoin and restrain defendants from subjecting plaintiffs and others represented by BRAC to the Policy Statement;

3. For an order releasing objectors from any obligation to pay dues, fees, or assessments to defendants or any subordinate or affiliated organizations as a condition of employment;

4. For a judgment allowing plaintiffs and the class they represent monetary damages for injuries sustained as a result of defendants' unlawful and unwarranted interference with and deprivation of their constitutional, civil, statutory and contractual rights.

5. For attorneys' fees, costs, and for such other and further relief as the Court may deem just and proper.

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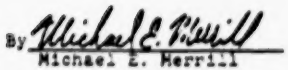
By 
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Attorneys for Plaintiffs

(Proof of service omitted in printing.)

EXHIBIT F

EXCERPTS FROM THE PROCEEDINGS OF THE 23RD REGULAR AND 9TH QUADRENNIAL CONVENTION OF THE BRAC, MAY 1967

• • •

One additional point we wish to bring out before reading the report of the committee is that we have now made a provision in respect to dues for associate members who are classified as members who retire because of age and perform no compensated service in industry over which the Brotherhood claims jurisdiction. Such members' dues would be the voluntary payment of one dollar ($1.00) per month. A retired member's interest changes from that of an active service employe, his main gains are achieved through legislative changes, rather than collective bargaining. It is, therefore, just and proper that a portion of his dues be earmarked for political activities. We have been advised that in view of the voluntary payment of these dues the procedure we are recommending in this area fully complies with applicable Federal law.

You will also note that we have added a section that permits a full dues paying member who does not desire to contribute to the legislative fund account to reduce his dues by 2c per month. This recommendation is being offered as a result of court litigation involving union shop contracts and the decisions rendered in the involved cases raises some doubt as to the use of union funds for political-legislative purposes against the wishes of a member. For this reason, our financial officers have calculated that approximately 2c per member per month is used for these purposes. Therefore, we have provided that these members have opportunity to not participate in this area to this limited extent. It is inconceivable to this committee that a member would not desire to participate in this very important function of our Brotherhood. However, the avenue of nonparticipation will now be available if a member insists.

Since your committee prepared its report, additional resolutions involving dues have been submitted. These resolutions are herewith listed by number—543, 545, 551, 552, 553, 562, 563, 570 and 574. Your committee has reviewed these resolutions and feels that the statements previously made in this report need not be changed nor its proposals altered.

Attention is directed to change in system board per capita tax which also would be reflected in Article 1, Section 15 (a), pages 106 and 107 of

the Protective Laws. Your committee will make the appropriate changes when codifying the laws after the convention.

For the delegates' information, you have heard the report of the Finance Committee just recently in regard to the Grand Lodge assuming the full cost for LABOR newspaper, and we are just bringing that to your attention at this time.

Your Committee on Grand Lodge Constitution and Laws proposes to amend Article 27, Section 2 (a), Section 4 (d) appearing on pages 60, 61, 62, and 63 of the Constitution of the Grand Lodge as follows:

PROPOSED CHANGES

Fees and Dues

Section 2 (a) Effective July 1, 1967, all full dues established by the 1963 Convention, or by other provisions of the Constitution and laws of the Brotherhood applicable to all members under the jurisdiction of each board of adjustment, shall be increased one dollar ($1.00) per member per month, except that no full dues shall be less than five dollars and fifty cents ($5.50) per member per month.

There shall be two kinds of dues applicable to members of the Brotherhood. Full dues shall be not less than five dollars and fifty cents ($5.50) per member per month, of which a minimum of one dollar and thirty cents ($1.30) per member per month shall be retained for state legislative tax and the use of the lodge; retention of membership dues which shall be one dollar ($1.00) per member per month, of which twenty-five cents (25c) shall be retained for the use of the lodge. Full dues shall apply to each member who received pay for forty (40) hours or more in any calendar month on a position in industry over which the Brotherhood claims jurisdiction, or the equivalent compensation under any agreement between an employer and the Brotherhood; to a member promoted to excepted or official positions and a member taking a voluntary leave of absence requiring approval of the organization. Each board of adjustment is authorized to fix uniform dues (above the minimum of five dollars and fifty cents ($5.50) per member per month) to apply to all members under the jurisdiction of the board, provided such dues shall be sufficient to meet Grand Lodge per capita tax, lawfully approved board of adjustment per capita tax and State Legislative Committee per capita

tax, subject to the approval of the International President.

Retention of membership dues shall apply to a member who performs no service in a calendar month due to reduction in force, furlough, military service, sickness, disability, resignation, and a member who receives pay for less than forty (40) hours in any calendar month on a position in industry over which the Brotherhood claims jurisdiction; and a member working in another craft in the industry where he is required to join another union under a union shop agreement.

Members who have retired because of age and who perform no compensated service on a position in industry over which the Brotherhood claims jurisdiction will be classified as associate members, with full rights to participate in the Death Benefit Department, if qualified, receipt of "The Railway Clerk," with right to attend lodge meetings of the Brotherhood, except they shall have no vote in the election of officers, or on matters pertaining to wages, rules, working conditions or grievances, and they may retain such membership by the voluntary payment of one dollar ($1.00) per month.

PROPOSED CHANGES

That Article 27, Section 4 (a) be amended to read as follows:

Per Capita Tax

Section 4 (a) Grand Lodge per capita tax shall be two dollars and ten cents ($2.10) per month or six dollars and thirty cents ($6.30) per quarter on full dues paying members, except that no per capita tax is payable on new or reinstated members for the quarter in which they apply for membership; seventy-five cents (75c) per month or two dollars and twenty-five cents ($2.25) per quarter on reduced dues paying members and shall be apportioned quarterly by the International Secretary-Treasurer to the different funds and fund accounts as follows:

Per Capita Tax on Full Dues Paying Members

General Fund Account (Grand Lodge)	$3.45
Protective Fund Account (Grand Lodge)	.45
Convention Fund Account (Grand Lodge)	.24

Death Benefit Fund (Grand Lodge) 1.20

Official Publication Fund Account (Grand Lodge) ..... .60

Organization Fund Account (Grand Lodge) ..... .30

*Legislative Fund Account (Grand Lodge) ..... .06

Total $6.30

*Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced two cents (2c) per month by notifying the lodge secretary in writing and paying his dues directly to the lodge secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the lodge secretary in writing and cannot be retroactive. The lodge secretary will acknowledge receipt of notice.

Retention of Membership Per Capita Tax

General Fund Account (Grand Lodge) ..... $ .15

Convention Fund Account (Grand Lodge) ..... .24

Death Benefit Fund (Grand Lodge) 1.20

Official Publication Fund Account (Grand Lodge) ..... .60

*Legislative Fund Account (Grand Lodge) ..... .06

Total $2.25

*Any member who does not desire to contribute to the legislative fund Account may have his dues reduced two cents (2c) per month, by notifying the lodge secretary in writing and paying his dues direct to the lodge secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the lodge secretary in writing and cannot be retroactive. The lodge secretary will acknowledge receipt of notice.

Associate Membership Per Capita Tax

General Fund Account (Grand Lodge) ..... $ .00

Convention Fund Account (Grand Lodge) ..... .00

Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
*Railway Clerks Political League	.45
Total	$2.25

*Any associate member who does not desire to make a voluntary contribution to Railway Clerks Political League may have his dues reduced 15c per month by notifying the lodge secretary in writing and making his payment direct to the lodge secretary. Reduction in dues will become effective with the month following the month in which the associate member notifies the lodge secretary in writing and cannot be retroactive. The lodge secretary will acknowledge receipt of the notice.

NOTE: An associate member is a member who has retired because of age and who performs no compensated service on a position in industry over which the Brotherhood claims jurisdiction, and per capita tax received on him is only allocated to those funds in which he has an interest or from which he receives service. The purpose of the voluntary contribution to Railway Clerks Political League is to advance and protect his interest through political activity in the legislative field and in particular to work for improvement of retirement systems established and maintained under law.

That Article 27, Section 4 (d) be amended to read as follows:

Board of Adjustment Per Capita Tax

(d) Board of Adjustment per capita tax shall be not less than two dollars and ten cents ($2.10) per member per month.

Mr. Chairman, I move adoption of the committee's report.

DELEGATE DEE: I second the motion.

GRAND PRESIDENT DENNIS: You have heard the committee's report. What is your pleasure?

The delegate at Mike 4.

DELEGATE JOHN J. CIRUCCI (Lodge 662): I would like to have a point of privilege. It is not spelled out what secretary collects the dues. Is that the recording secretary or is it the financial secretary?

GRAND PRESIDENT DENNIS: I can't hear you, brother.

DELEGATE BARFIELD (Lodge 1157): Mr. Chairman and delegates to the Convention: I rise in opposition to the committee's report as it is now written because it proposes to increase—not because it proposes to increase the dues, but because the proposed increase is too small. It is entirely insufficient in that it fails to provide the proper financial relief to the local lodges. As all of you know, the membership of the local lodges has declined steadily for the past several years, and all present indications point to a continued decline for some time to come. This reduction in membership has not resulted in a corresponding decrease in the work and duties to be performed by the local lodge officers. Rather, the officeres are now confronted with complex problems never dreamed of several years ago, such as computers, and with the policing of such agreements as the Union Shop Agreement and the February 7, 1965 Stabilization of Employment Agreement. The vast majority of the local lodge officers receive salaries which were fixed years ago and which even at that time were not commensurate with the responsibilities and duties required of them.

Instead of the salaries of the local lodge officers being adjusted periodically in proportion to the general wage increases applicable to the members we represent and in proportion to the salary increases voted for the system board officers and the Grand Lodge officers, it has been necessary in many cases to reduce the already inadequate amounts paid to the lodge officers. These reductions have been due solely to the loss of revenue resulting from the shrinkage of Class 1 membership.

Many of the lodges I represent have received communications from the Grand Lodge directing them to reduce expenses. In most of these cases, the directives can be complied with only by reducing the ridiculously low salaries of the local lodge officers. Other lodge expenses have also risen, just as the Grand Lodge and system boards' expenses have risen.

The increase proposed by the Committee on Laws would in the case of a lodge with one hundred Class 1 members amount to only $10 per month. Why not get what we need now? It will be four years before we

have another convention. Also by taking action at this time, we can eliminate the necessity of attempting to effect the dues increase through the individual system boards of adjustment.

Therefore, I move that the motion now before the convention be amended to provide for an increase in dues of $1.50 per month, with minimum dues of $6.00 per month with a 50c per month increase in the Grand Lodge per capita tax, a 50c per month increase in the system boards' per capita tax, and a 50c per month increase in the amount retained by the lodges for their use.

Thank you.

DELEGATE C. M. ENGLADE (Lodge 118): I second the amendment to the motion. (Applause)

GRAND PRESIDENT DENNIS: All right. You heard the amendment, and it is seconded, which as I understand it would establish a six dollars minimum dues instead of a five dollar and fifty cents minimum as proposed by the committee, with 50c going to the Grand Lodge, 50c to the system board, and 50c to the local lodge.

The delegate at Mike 2.

DELEGATE CHARLES H. PURKISS (Lodge 182): I am secretary-treasurer of the California State Legislative Committee. I got a little bit thinned out on the funds for increasing for our state legislative per capita. In trying to look ahead for four years with, I think, the increasing amount of political action we are going to have to take, coupled with the fact that California is a long state, being some twelve hundred miles in length, I would like to, if it is legally possible, amend the good brother's amendment by making that portion 40c to the local lodge and 10c to the state legislative committees.

. . . Cries of "No" . . .

GRAND PRESIDENT DENNIS: Is there a second to that amendment? It has to have a second on the amendment.

DELEGATE LESLIE A. CRAVER (Lodge 45): Mr. Chairman, I second that amendment.

GRAND PRESIDENT DENNIS: All right, you now have a motion made by the Laws Committee. You have an amendment to that motion made by Brother Barfield for fifty, fifty and fifty, and now you have an amendment to the amendment, which would make it fifty Grand Lodge, fifty System Board, forty cents to the local lodge, with a provision for ten cents of the fifty cents to go to the legislative committee from the local lodge. Now, that is all of the amendments that there can be to the motion.

We will now vote on the amendment to the amendment, which was the last brother's proposition. That is that out of the fifty cents the local lodge receives, ten cents of it would go to the legislative committees. That is the amendment to the amendment that we are voting on at the present time. Are you ready to vote?

DELEGATE HARVEY N. M. PATTERSON (Lodge 2307): Mr. Chairman, diversity is the spice of life. I am just the opposite to what the speaker was on Mike 4. I think we need an increase in dues, but I think that the committee has recommended too much. I would like the delegates to look at Resolution 552. I think that if we get a standard increase in dues that is not too great and possibly will do the job—I understand there is leeway, that local lodges can make assessments with the permission of the Grand President and get as much money as they need to operate, or the system boards can do likewise.

Now, Mr. Chairman, you said —

GRAND PRESIDENT DENNIS: Are you talking for or were you talking against what?

DELEGATE PATTERSON: I am against the committee's recommendation of $1.00 increase.

GRAND PRESIDENT DENNIS: Well, that is out of order at this time, because we are now discussing the amendment to the amendment. (Applause) So you are out of order at the present time. You can talk later.

DELEGATE PATTERSON: Can I move a substitute?

GRAND PRESIDENT DENNIS: I will recognize you later.

DELEGATE PATTERSON: I will wait.

GRAND PRESIDENT DENNIS: On this question before it is voted, I will recognize you.

VOICE FROM THE FLOOR: I move for the question.

GRAND PRESIDENT DENNIS: Wait a minute now.

. . . Cries of "Second" . . .

GRAND PRESIDENT DENNIS: Does anybody care to speak on the amendment to the amendment?

Microphone 4, and then Microphone 2.

DELEGATE HARRY H. ROACH (Lodge 335): Grand Worthy President, I have no intention of questioning with respect to the amount of the dues, but I want to know if we are going to be allowed to make other amendments which have nothing to do with the amounts of the dues, setting the amounts of the dues? Are we going to be allowed that privilege?

GRAND PRESIDENT DENNIS: Well, we have a motion on the floor, and we have an amendment to the motion, and we have an amendment to the amendment. Until the motion is passed, after we get rid of some of these amendments to the amendments and the amendment to the motion, then we will open it up again, if necessary.

DELEGATE ROACH: May I make one more point: Worthy President, under the Rules' Committee, rules to make a motion you are supposed to approach the microphone with your second. You are also supposed to submit amendments in writing.

GRAND PRESIDENT DENNIS: Well, I understand all that, and these people who have submitted these amendments will have to bring them up here in writing before any action can be taken on them.

DELEGATE ROACH: Then I take it that I will have an opportunity to submit an amendment that is not in conflict with the amendments?

GRAND PRESIDENT DENNIS: It all depends what you are trying to amend, brother. I can't give you a yes or no answer until I know what

you are trying to do. We have to take these in proper order now. Is there anybody who cares to speak specifically to the amendment to the amendment?

The delegate at Mike 3.

DELEGATE JESSE B. ASHLEY (Lodge 2032): Now, many of you were present in St. Louis in '43 when I literally put the state legislative committees on the map. I also have, since then, supported whatever was undertaken to give them financial support.

Now, it seems to me they are adquately financed. I can't help it because California is 900 miles away. We have given them 15 cents a month per member out of this whole organization, and I think that is enough. (Applause)

There is such a thing as building up a treasury to the point where you become top heavy with money. Then somebody is going to pilfer the till.

For God's sake, let's be reasonable. You have 15 cents per member. Let's vote this amendment to the amendment down. (Applause)

GRAND PRESIDENT DENNIS: Does anybody else wish to speak for or against the amendment to the amendment?

DELEGATE C. R. TRUDE (Lodge 2207): I have a point of information. What I want to know is if it will be permissible for our present assessments, under the present situation, to be continued and be allowed? If so, I will move for the question.

GRAND PRESIDENT DENNIS: Well, your present assessments are what? You do not explain what those assessments are.

DELEGATE C. R. TRUDE: They have been approved by you, Brother Chairman.

GRAND PRESIDENT DENNIS: Those assessments were only approved for a certain definite period of time, isn't that correct?

DELEGATE TRUDE: I talked to one of my good brothers the other night, and he said our present increased dues assessment would be allowed in addition to whatever the Convention allowed. I would like a

clarification on that.

GRAND PRESIDENT DENNIS: No. We would have to look at your problem again and see whether you needed any kind of special assessment.

DELEGATE TRUDE: I was afraid of that.

GRAND PRESIDENT DENNIS: That would mean they would not be allowed.

DELEGATE TRUDE: Then let's go for ten dollars dues. I ask for the question.

GRAND PRESIDENT DENNIS: The brother at Mike 4.

DELEGATE ROBERT M. CURRAN (Great Northern System Board No. 46): I rise to speak against the amendment to the amendment and in favor of the committee's report. I recognize that some of our people need more money. Some of the lodges need more money. Some of the system boards need more money. I presume the Grand Lodge representatives have asked for an adequate amount of money to take care of their needs for the next four years, too.

All I am asking the brothers here, who need more money, is that they do not impose their needs on those of us who do not need more money. (Applause)

If their needs are as they analyzed them, then I suggest they follow the Constitution and go back home and assess their needs at their system board level. We will take care of our finances, and we would not want somebody else to impose their financial difficulties on us.

Mr. President, I would ask the delegates to vote down the amendments and to support the committee's report. I also would like to suggest another thing before I leave the mike, and that is that we only charge $10 initiation fee, and I think herein lies a place to obtain more money. We have really cheapened our organization, in my judgment, by asking only for a $10.00 initiation fee. I know of organizations that do not do as well, that do far less well, than the Brotherhood of Railway Clerks, and they are charging $50.00 initiation fee. If there is a need for more money, they might look there for it. Otherwise, I suggest they go to their system board and take care of it there.

Please don't impose more dues on our board. Thank you. (Applause)

GRAND PRESIDENT DENNIS: The delegates at Mike 3.

DELEGATE E. C. WILSON (Lodge 590): On the amendment to the amendment, Mr. Grand President, seeing that this morning this body voted down any increase in legislative tax, I move the previous question. (Applause)

GRAND PRESIDENT DENNIS: Is there a second to that motion?

DELEGATE HICKMAN (Lodge 154): I second the motion.

GRAND PRESIDENT DENNIS: The previous question has been called for. That cuts off debate. If the majority vote in favor of the previous question, debate is cut off.

Those in favor of voting the previous question please hold up your right hand. Down hands. Those opposed? The previous question has been called for. We will now vote on the amendment to the amendment. That is, as I understand it, that the dues would be established at a $6.00 minimum 50 cents going to the Grand Lodge, 50 cents to the system board, 50 cents to the Local Lodge, with a guarantee that 10 cents more would go to the legislative committee out of that 50 cents. That is the amendment to the amendment, as I understand it.

Those in favor of the amendment to the amendment raise your right hand. Down hands. Those opposed? Down. The amendment to the amendment is lost. (Applause)

Now we are voting on the motion as amended, which would give the Grand Lodge 50 cents, the System Boards 50 cents, the Local Lodges 50 cents, and would establish a $6.00 minimum dues. This is Brother Barfield's amendment.

Those in favor of that amendment please raise your right hand. Down hands. Those opposed? The amendment to the motion is lost. (Applause)

We are now voting on the committee's report. The committee's report is as read and as stated and as printed in the book which you have before you. Those in favor—the delegate at Mike 4.

DELEGATE HARRY ROACH (Lodge 335): Mr. Chairman, I have here what may be a solution to this, and I would like to have the opportunity to read it—

GRAND PRESIDENT DENNIS: The previous question has been put, brother.

DELEGATE ROACH: It has nothing to do with the—

GRAND PRESIDENT DENNIS: Just a minute, brother. The previous question was called for, and we have to continue through, without suggestions. If you have a suggestion to make after the vote is taken, why, you can make your suggestion and maybe it will be accepted by the Convention.

Why does the other brother rise?

DELEGATE G. E. MURPHY (Lodge 3048): Point of personal privilege. The expenditures voted by this Convention are, in my opinion, just and equitable. However, I am not at this Convention to vote my will. I am here to vote the will of the people who sent me here, who did me the honor of sending me here, and until such time as their inequities are adjusted, I am unalterably opposed to a dues increase of any kind.

GRAND PRESIDENT DENNIS: Brother, your point of privilege is not well taken. You are out of order. Please release the mike.

We are now voting on the motion as submitted by the Laws Committee. Those in favor please raise your right hand. Down hands. Those opposed? The motion is adopted by more than a two-thirds vote. (Applause)

Mike 4.

DELEGATE ROACH: Now I will make my point, and maybe the Convention will wish to reconsider from the standpoint that it has nothing to do with the principles involved in the motion that has just been passed.

I call the delegates' attention and the committee's attention to Page 11 of their proposed changes of Article 27, Section 2(a), the second paragraph, in particular, the first and last sentence. If one understands

the problems of the smaller lodges, it is difficult for them to persuade a system board to increase dues to satisfy their needs when the consequences of such an action may result in raising the dues of many of our members who belong to lodges able to function properly under the proposed full dues.

Therefore, the manner in which the proposed change is worded will continue an injustice to many of our members from the standpoint that system boards may or may not raise dues of all members in order to provide funds, sufficient funds, for the operation of smaller lodges. However, in order to correct this situation and provide for the peculiar and individual needs of all lodges that will be equitable to the unique situation of each, each lodge understands its own needs and this may allow them to fix these needs, subject to the approval of the International President.

Therefore, in order to correct this situation, I move the proposed wording be amended as follows:

I move Committee Report No. 28, a proposal to amend Article 27, Section 2(a)—

GRAND PRESIDENT DENNIS: Brother—

DELEGATE ROACH: —Pages 60 and 61—

GRAND PRESIDENT DENNIS: Just a minute, brother. I think you are trying to reverse the action we have just taken.

DELEGATE ROACH: Wait until I have finished, and then you can make your ruling.

GRAND PRESIDENT DENNIS: Just a minute. You are reading from a statement, and you have not submitted any statement to us in writing.

DELEGATE ROACH: I will submit it upon the compietion of my reading.

GRAND PRESIDENT DENNIS: I would have to rule that you are now trying to reargue the question.

DELEGATE ROACH: No, I am not, Mr. President. If you will hear me out—

GRAND PRESIDENT DENNIS: If you want to submit your paper to the committee and ask them to give it some consideration, they can look at it. They have not seen it yet. I have not seen it.

DELEGATE ROACH: May I bring it up and let them look at it?

GRAND PRESIDENT DENNIS: You may bring it up here.

DELEGATE ROACH: Fine. That is all I ask.

GRAND PRESIDENT DENNIS: All right. The Delegates at Mike 3.

DELEGATE J. R. ADAMS (Lodge 519): I would like to be recorded as having voted "No," not that I disagreed with the action that was taken by this body; but those were my instructions when I left my lodge.

GRAND PRESIDENT DENNIS: Your vote will be recorded. If there is anybody else who wants his vote recorded, let him announce it or send his name up to the secretary. He will take your name and your lodge number.

Brother Weaver? Mike 2.

DELEGATE WEAVER: At this time I wish to move reconsideration of the committee's report, as a parliamentary procedure, in order that this will lock in the report. I have my seconder here with me.

DELEGATE C. J. LOWE (Lodge 715): I second the motion.

GRAND PRESIDENT DENNIS: Did you vote against the committee's report?

DELEGATE WEAVER: I voted in favor of the committee's report.

GRAND PRESIDENT DENNIS: So you have the right to move for reconsideration.

DELEGATE WEAVER: Yes. And I think it ought to be voted down and then this locks in the report.

GRAND PRESIDENT DENNIS: I hope they vote it down. We will see how they vote. The purpose of this is to lock in the question, so I hope you vote down the request for reconsideration.

Those in favor of reconsideration of this matter raise your right hand. Down hands. Those opposed to reconsideration raise your hand. Down hands. Thank you. The question is locked in.

The committee may proceed.

DELEGATE TOPPEN: Committee Report 20, Page 14, Resolution No. 46. This resolution proposes to amend Article 27, Section 2(b) page 61, to provide for the climination of dues stamps and a simplified method in allowing appropriate credit on the quarterly per capita tax report for sick-out-of-work members.

Your committee has analyzed this proposal and feels that the dues stamp and dues card system currently used by our Brotherhood is the only effective means for a member having a record of his dues payment and having a means of establishing a membership in good standing document. For these reasons, we recommend nonconcurrence.

Mr. Chairman, I move adoption of the committee's report.

DELEGATE DEE: I second the motion.

GRAND PRESIDENT DENNIS: You have heard the report. What is your pleasure?

. . . Cries of "Question" . . .

GRAND PRESIDENT DENNIS: Those in favor raise your right hand. Down hands. Those opposed. The report is adopted by more than two-thirds.

• • • •

Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1150

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX — VOLUME II

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PETITION FOR CERTIORARI FILED JANUARY 7, 1983.
CERTIORARI GRANTED APRIL 18, 1983.

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* * *

Accordingly we have included in our resolution amendments which allow for flexibility and new organizing situations are proportionately restricted, and also allow for flexibility within a subordinate unit providing that dues are maintained on a uniform basis for all employees covered by a single contract.

In addition to the proposed dues increase, your Committee likewise considered an increase in initiation and reinstatement fees; and while various resolutions were received covering increases from $50.00 to $150.00, your Committee, after full discussion and deliberation proposes a revision in the present initiation and reinstatement fee which your Committee feels is fair and equitable.

Your Committee on Grand Lodge Constitution and Laws proposes to amend Article 27, Section 1, Section 2, and Section 4, appearing on pages 70, 71, 73, 74, 75, and 76 of the Constitution of the Grand Lodge as follows—I will read the proposed changes—and the changes we are proposing are underlined; it is the right hand column; I will start out on page 13:

THAT ARTICLE 27, SECTION 1 BE AMENDED TO READ AS FOLLOWS:

Fees and Dues

Section 1. The initiation fee of the Brotherhood shall be thirty dollars ($30.00) and the reinstatement fee of the Brotherhood shall be forty-five dollars ($45.00). The initiation or reinstatement fee may be waived in whole or in part by the International President on applicants for membership who are in the service of an employer where the Brotherhood is conducting an organization campaign or endeavoring to establish or maintain right of representation for collective bargaining. The Grand Lodge shall receive fifteen dollars ($15.00) of each initiation fee and twenty-five dollars ($25.00) of each reinstatement fee, which shall be apportioned as follows:

	Int. Fee	Rein. Fee
General Fund Account (Grand Lodge)	$11.25	$21.25
Protective Fund Account (Grand Lodge)	1.50	1.50
Convention Fund Account (Grand Lodge)	.60	.60
Death Benefit Department Fund (Grand Lodge)	.90	.90
Official Publication Account (Grand Lodge)	.30	.30
Organization Fund Account (Grand Lodge)	.45	.45
Total to Grand Lodge	$15.00	$25.00

The Board of Adjustment shall receive eight dollars ($8.00) from each initiation fee and ten dollars ($10.00) from each reinstatement fee, the remainder to be retained by the Local Lodge.

PROPOSED CHANGES, on page 14:

THAT ARTICLE 27, SECTION 2 BE AMENDED TO READ AS FOLLOWS:

Section 2(a). Effective July 1, 1971, all full dues established by the 1967 Convention, or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division, shall be increased four dollars and fifty cents ($4.50) per member per month, except that no full dues shall be less than ten dollars ($10.00) per member per month.

Effective July 1, 1973, all full dues established by the 1971 Convention or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division, shall be increased two dollars ($2.00) per member per month, except that no full dues shall be less than twelve dollars ($12.00) per member per month.

There shall be two kinds of dues applicable to members of the Brotherhood. Effective July 1, 1971 full dues shall be not less than ten dollars ($10.00) per member per month of which a minimum of two dollars ($2.00) per member per month shall be retained for State Legislative tax and the use of the lodge. Effective July 1, 1973 full dues shall be not less

than twelve dollars ($12.00) per member per month, of which a minimum of two dollars and twenty-five cents ($2.25) per member per month shall be retained for State Legislative tax and the use of the lodge; retention of membership dues, which shall be one dollar and fifty cents ($1.50) per member per month of which forty cents (40¢) shall be retained for the use of the lodge. Full dues shall apply to each member who receives pay for forty (40) hours or more in any calendar month on a position in industry over which the Brotherhood claims jurisdiction, or the equivalent compensation under any agreement between an employer and the Brotherhood; to a member promoted to excepted or official positions and a member taking a voluntary leave of absence requiring approval of the organization.

Each Board of Adjustment and System Division is authorized to fix uniform dues (above the minimum of ten dollars ($10.00) per member per month) effective July 1, 1971 and twelve dollars ($12.00) per member per month effective July 1, 1973 to apply to all members subject to the scope rule of each individual contract under the jurisdiction of the Board of Adjustment or System Division, provided such dues shall be sufficient to meet Grand Lodge per capita tax and State Legislative Committee per capita tax, subject to the approval of the International President.

Retention of membership dues shall apply to a member who performs no service in a calendar month due to reduction in force, furlough, military service, sickness, disability, resignation, and a member who receives pay for less than forty (40) hours in any calendar month on a position in industry over which the Brotherhood claims jurisdiction; and a member working in another craft in the industry where he is required to join another union under a Union Snop Agreement.

Members who have retired because of age and who perform no compensated service on a position in industry over which the Brotherhood claims jurisdiction will be classified as associate member, with full rights to participate in the Death Benefit Department, if qualified, receipt of the RAILWAY CLERK, with right to attend lodge meetings of the Brotherhood, except they shall have no vote in the election of officers, or on matters pertaining to wages, rules, working conditions or grievances, and they may retain such membership by the voluntary payment of one dollar and fifty cents ($1.50) per month.

We did not change Section (b) or (c).

We added Section (d), and it reads as follows:

(d) In the event of extraordinary circumstances, involving ongoing organizational efforts, new representation, specific national problems, restrictive labor laws, or other unusual circumstances, any subordinate unit may petition the International President for permission to lower the minimum Board of Adjustment, System Division or Local Lodge per capita tax specified herein and elsewhere. The International President may grant such waiver subject to annual review by him, provided that, in his judgment, the needs of the Brotherhood can be adequately met and the circumstances warrant such action.

(e) In the event of extraordinary circumstances involving new organizational efforts, newly acquired representation rights, initial contracts, and situations wherein existing rates or pay or working conditions are determined to be below the over-all pattern of our Brotherhood, any subordinate unit or units involved may petition the International President for, or the International President may initiate on his motion, a partial reduction of the Grand Lodge per capita tax for the members covered by the respective contract or organizing situation, subject to the approval of the Finance Committee. Reductions so granted shall not extend beyond the term of the initial contract unless resubmitted and approved by the Finance Committee.

PROPOSED CHANGES

THAT ARTICLE 27, SECTION 4(A) BE AMENDED TO READ AS FOLLOWS:

Per Capita Tax

Section 4.(a) Effective July 1, 1971
Grand Lodge per capita tax shall be four dollars ($4.00) per month or twelve dollars ($12.00) per quarter on full dues paying members, except that no per capita tax is payable on new or reinstated members for the quarter in which they apply for membership; one dollar and ten cents ($1.10) per month or three dollars and thirty cents ($3.30) per quarter on reduced dues paying members and shall be apportioned quarterly by the International Secretary-Treasurer to the different funds and fund accounts as follows:

Per Capita Tax on Full Dues Paying Members

General Fund Account (Grand Lodge)	$ 7.50
Protective Fund Account (Grand Lodge)	.75
Convention Fund Account (Grand Lodge)	.60
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
Organization Fund Account (Grand Lodge)	1.25
*Legislative Fund Account (Grand Lodge)	.10
Total	$12.00

Effective July 1, 1973 Grand Lodge per capita tax shall be five dollars ($5.00) per month or fifteen dollars ($15.00) per quarter on full dues paying members, except that no per capita tax is payable on new or reinstated members for the quarter in which they apply for membership; one dollar and ten cents ($1.10) per month or three dollars and thirty cents ($3.30) per quarter on reduced dues paying members and shall be apportioned quarterly by the International Secretary-Treasurer to the different funds and fund accounts as follows:

Per Capita Tax on Full Dues Paying Members

General Fund Account (Grand Lodge)	$10.50
Protective Fund Account (Grand Lodge)	.75
Convention Fund Account (Grand Lodge)	.60
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
Organization Fund Account (Grand Lodge)	1.25
*Legislative Fund Account (Grand Lodge)	.10
Total	$15.00

*Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third cents (3⅓¢) Secretary in writing and paying his dues direct to the Lodge Secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the Lodge Secretary in writing and cannot be retroactive. The Lodge Secretary will acknowledge receipt of notice.

Retention of Membership Per Capita Tax

General Fund Account (Grand Lodge)	$ .80
Convention Fund Account (Grand Lodge)	.60
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
*Legislative Fund Account (Grand Lodge)	.10
Total	$3.30

*Any member who does not desire to contribute to the Leisiative Fund Account may have his dues reduced three and one-third cents (3⅓¢) per month by notifying the Lodge Secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the Lodge Secretary in writing and cannot be retroactive. The Lodge Secretary will acknowledge receipt of notice.

Associate Membership Per Capita Tax

General Fund Account (Grand Lodge)	$ .75
Convention Fund Account (Grand Lodge)	.00
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
Railway Clerks Political League	.75
Total	$3.30

Any Associate member who does not desire to make a voluntary contribution to Railway Clerks Political League may have his dues reduced 25¢ per month by notifying the Lodge Secretary in writing and making his payment direct to the Lodge Secretary. Reduction in dues will become effective with the month following the month in which the Associate member notifies the Lodge Secretary in writing and cannot be retroactive. The Lodge Secretary will acknowledge receipt of the notice.

NOTE: An associate member is a member who has retired because of age and who performs no compensated service on a position in industry over which the Brotherhood claims jurisdiction, and per capita tax received on him is only allocated to those funds in which he has an investor from which he receives service. The purpose of the voluntary contribution to Railway Clerks Political League is to advance and protect his interest through political activity in the legislative field and in particular

to work for improvement of retirement systems established and maintained under law.

(b) Grand Lodge per capita tax is payable quarterly in the month following the close of each calendar quarter. Tax for the first quarter of each calendar year is payable in April; second quarter tax in July; third quarter tax in October, and fourth quarter tax in January. Failure of a lodge to pay Grand Lodge tax within time specified above subjects it to suspension. Members in good standing of such supended [*sic*] lodge may transfer to another lodge.

(c) Per capita tax advanced on members who are not subject to suspension. Members in good standing of such suspended lodge may transfer to another lodge.

(c) Per capita tax advanced on members who are not subject to suspension under the provisions of Article 6, Section 1, of the Lodge Statutes at the time quarterly per capita tax report is made to the International Secretary-Treasurer, shall upon proper certification be credited to the lodge by the International Secretary-Treasurer for any month of the current quarter and the last month of the previous quarter for which dues were not paid.

Board of Adjustment Per Capita Tax

(d) Effective July 1, 1971 Board of Adjustment and System Division per capita tax shall be not less than four dollars ($4.00) per member per month. Effective July 1, 1973 Board of Adjustment and System Division per capita tax shall be not less than four dollars and seventy-five cents ($4.75) per member per month.

Mr. Chairman, I move adoption of the Committee's report.

DELEGATE FITZJARRELL: I second the motion.

INTERNATIONAL PRESIDENT DENNIS: You have heard the report of the Committee. The report is to adopt.

Mike 2.

DELEGATE T. B. GOODWIN (TC Division 43): I wish to amend the motion as follows: That the present Grand Division proportion of the per capita tax not be changed for the Canadian membership at this time.

DELEGATE R. E. RITTER (TC Division 43): I second the motion.

INTERNATIONAL PRESIDENT DENNIS: You have heard the amendment. Is there any further discussion on the question? There are quite a few Delegates there at Mike 3 and Mike 1. I think we had better — what does Mike 3 want to discuss?

DELEGATE HARVERY PATTERSON (Lodge 2307): Mr. Chairman, I was going to discuss the Committee's report. The amendment might throw a bit of a hitch into it. I can understand Brother Goodwin's situation, and if I may go a bit broader, I hope you won't be too tough with us on the mike, and maybe you will get all the debate here at one particular time.

I have no serious objection to Article 27, Section 1. You know, at least I haven't got anything to comment on one way or the other. But Article 27, Section 2 I must state an objection to that particular proposed amendment to the Constitution. And I just want to explain my position.

I am just a little Local Chairman who tried to do a job on the local. . . .

• • • •

INTERNATIONAL PRESIDENT DENNIS: I think several delegates have expressed that point of view, Brother Gallagher. Mike 1.

DELEGATE PIKE (Lodge 310): Brothers and Sisters. I think we have gotten a debate out of perspective as to what is involved here.

I appeared before this Laws Committee in connection with some of these proposals and got some assurances as to how it might work. I might say to you that on our Board we have fourteen NLRB agreements under our jurisdiction, and we have nine rail agreements.

Now, if I understand what we are here talking about, we are talking about an increase in dues up to a minimum of ten dollars per month with the right of the System Board to come back and ask for a reduction below ten dollars a month or above ten dollars a month.

At the present time the dues on our Board are $6.50 a month. If we accept this $4.50 as is, they would be $11 a month. That is the initial amount.

If we accept it as is, they would be $13 a month in 1973.

Now, why are we having to raise dues? That is the first thing that I must ask. It is because our Local, System and International Units of this great Brotherhood went out, particularly the International Unit, and negoitated an agreement that put $3,600 a year in the United States into the rail employee's pockets in this country by April 1, 1973.

Now, I am not particularly concerned as to the division, with the exception that I know this Brotherhood, because it went out and called strikes and fought for the members of this Brotherhood and spent in excess of what this last Convention provided in funds to service the membership. I am not going to belabor the question too long. I would suggest to you that your System Boards have the authority to ask for a reduction in dues below the minimum. They have the authority to ask for a reduction in dues where you have a unit, a unit of members, that is below standard in wages, and let the System Boards adjust those problems and ask the International President for that authority, and I assure you he will grant it if you are solvent.

If you need to reduce your dues below the ten dollar minimum, you can get the authority if you have too much money. If you need to increase them above the ten dollar minimum, you can get the authority if you do not have enough money. Let's give this International enough money to replenish what has been depleted from this treasury as a result of this team of International Officers which has been in office the last eight years having gone out and making more progress in terms of wages and improvements in our working conditions. Let's replenish the larder.

What do you do when you take your paychecks home? You go and buy the groceries —

. . . Cries of "time time" . . .

DELEGATE PIKE: All right. Let me say just one more thing. This International leader that we have in Brother C. L. Dennis has accomplished more for this membership in the last eight years than has been accomplished in the previous thirty. Let's give him some money to get us some more and to get some more for the members we represent. (Applause)

INTERNATIONAL PRESIDENT DENNIS: Mike 3. We will have one more speaker from Mike 3, and then we are going to recess and I will make a statement after I hear from the speaker at Mike 3.

DELEGATE OSCAR DESDERIAN (Lodge 106): Mr. Chairman and Fellow Delegates, this will be very short. I make a motion to submit this back to committee for further study. (Applause)

DELEGATE L. R. DRAGONETTI (Lodge 653): I second the motion.

INTERNATIONAL PRESIDENT DENNIS: You have heard the motion to resubmit the matter back to the Laws Committee for further study and report back here later this evening. Those in favor? Please raise your right hand. Down hands. Those opposed? The motion is carried.

Just one minute. This is about a matter of money, too.

INTERNATIONAL SECRETARY-TREASURER SULLIVAN: Instead of six p.m., the pay window is open right now, on the lower level. They are paying off right now.

. . . The Convention recessed at five thirty-five o'clock . . .

* * * *

What is your pleasure?

. . . The question was called . . .

Those in favor raise your right hand; down hands; those opposed; the report is adopted.

The Laws Committee is ready to continue with their report, and we will now hear from the Laws Committee. Brother Geral Toppen and Brother Arch Fitzjarrell will report.

DELEGATE TOPPEN: We ask that you turn to page 13 of the Committee's report.

I would like to make these comments before setting out the final deliberation, or the deliberations of the Laws Committee after this afternoon's session was recessed.

Your Committee considered approximately 10 proposals that were presented in writing. These written documents did not object to an increase in dues; however, there was an indication that the delegates did not desire to increase the dues quite as much as originally proposed by the Committee.

The basic thrust of the written documents was to the distribution of the dues increase.

It was further apparent that the objections were raised to the Committee's report with respect to the step rate increase of dues.

It was your Committee's understanding at the conclusion of the afternoon session that we were to take all of the written documents submitted by the delegates at this Convention and analyze same without regard to whether or not this Convention's rules were complied with in submitting amendments to a committee report; this we did. No suggestion was discarded on parliamentary procedure handling; all were considered.

Your Committee attempted to arrive at a consensus of opinion of the delegates through a review of the suggestions made. Frankly, it is our desire to hit a happy medium. It would be impossible, however, to satisfy everyone in this respect, and we hope that the delegates put aside their

individual problems so as to permit this Convention to find a harmonious solution to a very difficult and vexing problem.

With respect to your Committee's report, appearing on page 13, your Committee proposes to change its recommendations on initiation and reinstatement fees by changing the allocation of funds to give the Grand Lodge $10.00; the System Board $10.00; and the Local $10.00, out of each initiation fee. That is right down the line, 10, 10, and 10.

The Committee proposes to change its report to give the Grand Lodge $20.00; the System Board $10.00; and the Local Lodge $15.00 out of each reinstatement fee.

Page 13 of the Committee's report would be corrected accordingly. You will notice there where it says, "The Grand Lodge shall receive fifteen" — change that to "ten"; and where it says "of each initiation fee and twenty-five dollars", you would change that to read "twenty".

With respect to the Grand Lodge, they would be getting five dollars less, so that initiation fee — General Fund Account for the Grand Lodge would be changed from $11.25 to $6.25; and reinstatement fee to Grand Lodge, General Fund, instead of being $21.25 would read $16.25.

And then, at the bottom there, the Board of Adjustmen [*sic*] shall receive $10.00 from each initiation or reinstatement fee, the remainder to be retained by the Local Lodge. So you can make that $8.00 read $10.00, and then from each initiation and reinstatement fee the remainder to be retained by the Local Lodge. Do you have those corrections?

Also, a paragraph would be added to provide that any subordinate unit that desires to establish an initiation fee or reinstatement fee above the $30.00 and $45.00 amount recommended by the Committee shall be permitted to do so if a majority of the members of said unit and the International President approve same.

On page 14, I will read the sections. Section 2(a). This is what your Committee proposes. "Effective July 1, 1971, all full dues established by the 1967 Convention or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division, shall be increased $5.50 per member per month, except that no full dues shall be less than $11.00 per member per month."

Now, we would take out the second paragraph completely. It would be just a one step deal. That "Effective July 1, 1973" can be scratched, that whole paragraph there that is underlined.

Then it would read, the next paragraph: "There shall be two kinds of dues applicable to members of the Brotherhood. Effective July 1, 1971 full dues shall be not less than $11.00 per member per month, of which a minimum of $2.00 per member per month shall be retained for State Legislative tax and the use of the lodge."

Then you could scratch out "Effective July 1, 1973" because there would be no dues increase July 1, '73. So start scratching out "Effective July 1, 1973." The next full line; the third full line; the fourth full line; the fifth full line; where "the lodge" is on the sixth line, before the semicolon. The rest there, there would be no change. That is the retention of membership provision.

On page 15, that $10.00 would be changed to $11.00. That would be a minimum of $11.00 per member per month effective July 1, 1971; the balance of that line and up to July 1, 1971, line 3 to be scratched. That would be the change on page 15.

On page 16: "That Article 27, Section 4(a) be amended to read as follows:

"Effective July 1, 1971 Grand Lodge per capita tax shall be $4.20 per member per month or $12.60 per quarter." So that $4.00 would be $4.20, and the $12.00 would be $12.60.

And in connection with that, the per capita tax on full dues paying members, the General Fund Account of the Grand Lodge would be changed from $7.50 to $8.10. And the total at the bottom would be changed from $12.00 to $12.60.

Page 17. Those first two paragraphs on page 17, starting with "Effective July 1, 1973," all the way down to where the asterisk appears, would be scratched out because there would be no second dues increase.

Then you can turn to page 19, if you will please. That would read, "Effective July 1, 1971 Board of Adjustment and System Division per capita tax shall be not less than $4.20 per member per month." The rest of that paragraph would be scratched out.

Now, basically, in the allocations and in this increase, it would give each unit of the Brotherhood the same proportionate amount.

Mr. Chairman, I move adoption of the Committee's report as amended.

DELEGATE FITZJARRELL: I second the motion.

INTERNATIONAL PRESIDENT DENNIS: As I understand it, the $2.10 out of the present minimum dues of $5.50 to the Grand Lodge would become $4.20. The $2.10 to the System Board would become $4.20. And the $1.30 to the Local Lodge would become $2.60, or a 100 percent increase across the board, making a total of $11.00, and it would be a one step proposition.

Mike 2.

DELEGATE WILLIAM H. McCARTHY (Lodge 1298): I think this is in order. I move that we divide the question, and debate and vote on each section of the amended Article 27 separately.

DELEGATE DAVID C. TRAYNOR (Lodge 361): I second the motion.

INTERNATIONAL PRESIDENT DENNIS: Well, I think that the initiation fee and the reinstatement is divisible. I mean that is separate and apart, but when we get into the dues, I do not think we can divide that section by section. It has to be a total package.

We can handle the initiation and the reinstatement fee separately, and take a vote on that question. That was ten, ten and ten on the initiation, and twenty, ten and fifteen for the local lodge on the reinstatement.

Now, is it the desire of the Covention [*sic*] to divide the question and handle the initiation and reinstatement fee separately from the dues question? Is that the desire?

. . . Cries of "No" . . .

INTERNATIONAL PRESIDENT DENNIS: Those in favor of dividing the total question, handle the initiation and the reinstatement

fee separately, those in favor of doing that please raise your right hands. Down hands. Those opposed.

Well, I think the question will be divided. We will take a vote on the initiation fee and reinstatement fee part of the committee's report which pertains to the initiation fee and reinstatement fee—I am trying to explain this first, and then I will give you the mike.

The initiation fee would be divided $10 to the Grand Lodge, $10 to the System Board, and $10 to the Local Lodge. A reinstatement fee would be $20 to the Grand Lodge, $10 to the System Board, and $15 to the Local Lodge.

That is the question. Mike 2.

DELEGATE ROBERT J. CRANCH (Lodge 8007): President Dennis, in respect to—a point of information—in respect to the $30 initiation fee that is facing us now, we do not have a closed shop in Canada. We have a check-off of Union dues.

The question that I am asking is this: Would it be possible for the System Division to collect the monthly dues until such time as the monthly dues accumulated becomes the initiation fee and then it would be simply to sign the member up as a member, or would it have to be a cash payment of $30?

INTERNATIONAL PRESIDENT DENNIS: Brother Cranch, I think I can alleviate the problem. We recognize that there is a difference, that you have a different kind of an arrangement in Canada. And there would be no requirement—there is no requirement now for an initiation fee, right?

DELEGATE CRANCH: Right.

INTERNATIONAL PRESIDENT DENNIS: That policy would continue.

DELEGATE CRANCH: I am sorry.

INTERNATIONAL PRESIDENT DENNIS: It is all right.

DELEGATE CRANCH: Right now the member must pay an initiation fee of $10. The question that I am asking is, is the accumulation of

the union check-off, as an example, if the dues were $10.00 a month times three, he could not join until he had three months dues deductions. He could not join until the fourth month.

INTERNATIONAL PRESIDENT DENNIS: Well, let me find out what the practice in Canada is at the present time.

INTERNATIONAL VICE PRESIDENT McGREGOR: Brother Cranch, as I understand it, you are talking about Canadian Pacific Airlines?

DELEGATE CRANCH: Principally, Bill, yes.

INTERNATIONAL VICE PRESIDENT McGREGOR: Where you presently do pay an initiation fee?

DELEGATE CRANCH: They pay it out of their pocket.

INTERNATIONAL VICE PRESIDENT McGREGOR: They pay it out of their pocket? Well, that is not what Brother Dennis was talking about, International President Dennis. That is different from what we have on the rail, where your monthly dues, as collected by the modified Rand formula until you have paid sufficient to pay your initiation fee is considered to be your initiation fee.

DELEGATE CRANCH: There is a correction, Bill, on CN Rail they too pay $10 out of their pocket in order to become a member.

. . . Cries of "No" . . .

INTERNATIONAL PRESIDENT DENNIS: Well, let me put it this way. If the Canadian lodges and Canadian membership have any problem on this initiation fee, I am sure that Brother McGregor can work it out with the General Chairman along with Brother Dick Smith and there will be no problems.

DELEGATE CRANCH: Fine, I have my answer from a GS and T of the BRAC organization. I am satisfied now.

INTERNATIONAL PRESIDENT DENNIS: Okay. Mike 3.

DELEGATE HERSHELL L. OLIVER (Lodge 1913): I move that we adopt the Committee's report.

DELEGATE OSCAR DERDERIAN, SR. (Lodge 106): I second the motion.

INTERNATIONAL PRESIDENT DENNIS: Now are you talking about the divided report, or the whole report? You are talking about the initiation fee and reinstatement, right?

DELEGATE OLIVER: Right.

INTERNATIONAL PRESIDENT DENNIS: That is what we have before the house.

DELEGATE OLIVER: Right.

INTERNATIONAL PRESIDENT DENNIS: All right.

DELEGATE WILLIAM T. GALLAHER (Lodge 2100): Mr. Chairman, a point of personal privilege, please.

. . . Cries of "Oh" . . .

INTERNATIONAL PRESIDENT DENNIS: Brother Gallagher, I have recognized you, you know, for quite a few times, and if every delegate got up for personal privilege as frequently as you have we would be here for quite awhile. (Applause and whistles)

I hate to do this, but we are on this question now. Let us get to the bottom of this question, and then later on the point of personal privilege should not be recognized for a statement at this time. We are discussing this issue. Unless it is on this question, either for or against, I have to deny you the right to speak at this time. (Applause)

All right, are you ready to vote?

. . . The question was called . . .

INTERNATIONAL PRESIDENT DENNIS: Those in favor of the committee's amended report, that the initiation fee and reinstatement fee be amended to provide that—reinstatement and fees by changing the

allocation to give the Grand Lodge $10, the System Board $10, and the Local Lodge $10, out of each initiation fee. The Committee proposes to change its report to give the Grand Lodge $20, the System Board $10, and the Local Lodge $15 out of each reinstatement fee.

Then also that any subordinate unit desiring to increase the initiation fee or reinstatement fee above the $30 or $45 recommended by the Committee shall be permitted to do so if a majority of the members of said unit and the International President approves same.

Now, that is what we are voting on. Those in favor please raise your right hands. Down hands. Those opposed.

That portion of the Committe's [*sic*] report is adopted. (Applause) In excess of a two-thirds vote.

Now the question of dues is in the balance of the report. The Committee's report is that the second step be eliminated. The $12 step be eliminated, and we have a dues of $11; that the present minimum of $5.50 become $11.00; and that the Grand Lodge portion, which is $2.10 become $4.20, the System Board portion, which is $2.10 become $4.20; and the local lodge portion which is $1.30 become $2.60. A complete equal distribution across the board.

Then the distribution of the funds are as detailed by the Chairman of the Laws Committee.

That is the question before us now. Mike 2.

DELEGATE T. B. GOODWIN (Lodge 8043): Brother Dennis, before I made a motion that the Canadian delegation—that the President—my amendment to the motion was that the present Grand Division portion of the per capita tax not be changed for the Canadian membership at this time.

I feel that it is only right to explain to the sisters and brothers from the States why I made this amendment.

First, I wish to state that we are not opposed to an increase in dues. We in Canada are not afraid to face our membership because we too have made good gains, and we want to carry our weight.

However, for the United States brothers and sisters, I would like to state what we are up against north of the border.

In Canada we have two major railways, the Canadian Pacific, which is represented by BRAC, BRAC only represents the TC employees on the Canadian National. The balance of clerks are represented by a National Union, the Canadian Brotherhood of Railway Transport and General Workers. Their dues are $5.50 per month. You are now asking us to increase our dues to $11.00, double theirs for the same representation.

When we negotiate in Canada, we. . . .

* * * *

. . . their specific problems. So now we will vote on the previous question.

The previous question is the amendment made by the Brother from Roanoke, and that amendment that he made reads as follows: "That Article 27, Section 2, be amended to read as follows: Section 2(a) —"

I have to put the question to see if the majority want the previous question. My parliamentarian here so advises me. Those in favor of moving the previous question please vote by raising your right hands. Down hands. Those opposed.

We will now vote on the previous question. The previous question that was brought up was the amendment made by the Delegate from Roanoke, which reads as follows. It was an amendment to the Committee's revised report. "Section 2(a). Effective July 1, 1971, all full dues established by the 1967 Convention, or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division shall be increased $2.50 per member per month, except that no full dues shal [*sic*] be less than $8.00 per member per month.

"Effective July 1, 1973, all full dues established by the 1971 Convention or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division shal [*sic*] be increased $2.00 per member per month, except that no full dues shall be less than $10.00 per member per month, and distribution of dues proportionately."

This is submitted by the Delegate from Lodge 1385, Roanoke, Virginia. I don't have that Delegate's name, but I guess it is in the record.

Now, that was the amendment from the floor to the Committee's report. We will first vote on that amendment. And then if that amendment carries, we will vote on the total report as amended. If it loses, we will then vote on the Committee's report. Is that clear? So you are now voting on the amendment of the Delegate who submitted if from the floor.

Those in favor of the amendment from the floor please raise your right hands. Down hands. Those opposed. The amendment is lost.

We will now vote on the Committee's report, and the Committee's report was that the dues shall be $11.00 and the Grand Lodge portion would be $4.20 a month; the System Board portion $4.20; and the Local Lodge portion $2.60, with the understanding, as I stated previously, any General Chairman who thinks he does not need that much money can write in and get forgiveness from the International President.

Are you ready to vote?

. . . Calls for the question . . .

INTERNATIONAL PRESIDENT DENNIS: Those in favor of the Committee's report please raise your right hands. Down hands. Those opposed.

Well, let's see if we can see a little better by a standing vote. Those in favor of the Committee's report please rise.

. . . Those in favor of the motion arose . . .

INTERNATIONAL PRESIDENT DENNIS: Everybody rise who is in favor of the Committee's report, and we will have the Tellers tabulate their particular tables. It looks to me like we have two thirds.

. . . Cries of "Oh" and applause . . .

INTERNATIONAL PRESIDENT DENNIS: This is the Committee's amended report. You see, the TC Division over on this side of the house only has a half a vote.

. . . Cries of "Roll call" . . .

INTERNATIONAL PRESIDENT DENNIS: And I will bet my right arm that there's two thirds of the Delegates standing.

. . . Cries of "No" and "Roll call" . . .

INTERNATIONAL PRESIDENT DENNIS: Now we are not going to gain anything by a lot of hollering. I will do what this Convention wants me to do. I am trying to be fair and honest about this thing. I could very easily say that this is a two-thirds vote. So now, if anybody wants to get a little rough with the Chair, the Chair in turn will get a little rough with them. (Applause)

Now, I have tried to be considerate. (Applause)

I now declare we have a two-thirds vote standing. (Applause and cheers) And this is the ruling of the Chair. (Applause and cheers)

DELEGATE TOPPEN: Committee Report No. 5, page 4, Resolution No. 7, page 4.

DELEGATE F. M. SHEAHAN (TC Division 1): Mr. Chairman, Mr. Chairman.

INTERNATIONAL PRESIDENT DENNIS: What is the problem?

DELEGATE SHEAHAN: Point of privilege.

INTERNATIONAL PRESIDENT DENNIS: State it.

DELEGATE SHEAHAN: I have a point of privilege.

INTERNATIONAL PRESIDENT DENNIS: State your point.

DELEGATE SHEAHAN: I wish to challenge the Chair on the vote. (Applause and cheers)

DELEGATE JOAN D. BRDA (Lodge 36): I second the motion. (Applause)

INTERNATIONAL PRESIDENT DENNIS: All right. If two-thirds of the Delegates challenge the decision of the Chair, we will then have a roll call vote. (Applause)

Now, those delegates who wish to challenge the decision of the Chair please rise.

. . . Those who wished to challenge the decision of the Chair arose . . .

INTERNATIONAL PRESIDENT DENNIS: That is not two-thirds of the house. (Applause and cheers)

The decision of the Chair stands.

DELEGATE TOPPEN: Committee Report No. 5, page 4, Resolution No. 7, page 4.

This resolution has been submitted by one of our Canadian Board of Adjustments to delete that portion of Article 5, Section 3, pages 6 and 7 of the Grand Lodge Constitution, pertaining to partisan politics.

Your committee feels that the primary purpose of such submission was to clearly establish the current practice of allowing the International Vice President-Canada, with the approval of the International President, to support political parties in Canada. It is necessary to support a party as a whole, rather than individual candidates, so as to effectively exert political strength in behalf of our Canadian membership. The Canadian political system is different than the United States System, and we must give recognition to this difference.

Your committee feels that our current policy, as announced at the last Brotherhood Convention, contemplates such handling of endorsement of political parties by our Canadian International Vice President; however, we desire to clearly establish through this minor constitutional amendment the current practice now being followed.

The committee on Grand Lodge Constitution and Laws proposes to amend Article 5, Section 3, on pages 6 and 7 of the Constitution of the Grand Lodge, as follows:

THAT ARTICLE 5, SECTION 3 BE AMENDED TO READ AS FOLLOWS:

"Section 3. The influence or sympathy of the Brotherhood as a body shall never be enlisted or used in favor of any religious organization. No member is permitted to discuss in any manner (in meetings while

discussing Brotherhood business any religious matters, or criticize the religious belief of any member; nor can the influence or sympathy of the Brotherhood as a body be used in favor of partisan politics, or any political party, (except where the International Vice President-Canada, with the authority of the International President and in accordance with Canadian Laws, has made such an endorsement in Canada), and any lodge permitting the same to be done shall have its charter suspended, and all members participating in such discussion shall be subject to expulsion."

Mr. Chairman, I move adoption of the committee's report.

DELEGATE FITZJARRELL: I second the motion.

INTERNATIONAL PRESIDENT DENNIS: You have heard the committee's report. What is your pleasure?

. . . The question was called . . .

INTERNATIONAL PRESIDENT DENNIS: Mike 2.

* * *

EXHIBIT H

1971 CONSTITUTION

ARTICLE 25
REPRESENTATION

American Federation of Labor and Congress of Industrial Organizations

Section 1. Representatives to Conventions of the American Federation of Labor and Congress of Industrial Organizations shall consist of the International President and such other members appointed by him in number sufficient to give the Brotherhood the representation to which it is entitled under the governing laws of the American Federation of Labor and Congress of Industrial Organizations. The allowance to delegates (except International Officers and full-time employes of the Grand Lodge) shall be on the same basis as was provided for delegates attending the preceding Grand Lodge Convention. Full-time International Officers and employes shall be paid their expenses and regular salaries.

ARTICLE 26
COMMUNICATING—SOLICITING FUNDS

Section 1. A subordinate unit, officer, committee member, or member shall not send circulars or letters to any subordinate unit or member encouraging or advocating violation of, or having the tendency or effect of violating, the obligations imposed upon them by Article 5 of this Constitution.

Section 2. (a) Subordinate units, officers, committee members and members must not solicit funds in the name of the Brotherhood unless authorized by the International President.

(b) A subordinate unit of the Brotherhood shall not be denied the right to publish souvenir programs for social functions when they do not carry paid advertising, nor are social functions conducted by a subordinate unit prohibited when the sale of tickets is handled by its own member.

ARTICLE 27
FEES AND DUES

Section 1. The initiation fee of the Brotherhood shall be thirty dollars ($30.00) and the reinstatement fee of the Brotherhood shall be forty-five dollars ($45.00). The initiation or reinstatement fee may be waived in whole or in part by the International President on applicants for membership who are in the service of an employer where the Brotherhood is conducting an organization campaign or endeavoring to

establish or maintain right of representation for collective bargaining. The Grand Lodge shall receive ten dollars ($10.00) of each initiation fee and twenty dollars ($20.00) of each reinstatement fee, which shall be apportioned as follows:

	Init. Fee	*Rein. Fee*
General Fund Account (Grand Lodge)	$ 6.25	$16.25
Protective Fund Account (Grand Lodge)	1.50	1.50
Convention Fund Account (Grand Lodge)	.60	.60
Death Benefit Department Fund (Grand Lodge)	.90	.90
Official Publication Account (Grand Lodge)	.30	.30
Organization Fund Account (Grand Lodge)	.45	.45
Total to Grand Lodge	$10.00	$20.00

The Board of Adjustment shall receive ten dollars ($10.00) from each initiation or reinstatement fee, the remainder to be retained by the Local Lodge.

Any subordinate unit that desires to establish an initiation fee above the thirty dollar ($30.00) or a reinstatement fee above the forty-five dollar ($45.00) amount shall be permitted to do so provided a majority of the members of said unit and the International President approves same.

Section 2. (a) Effective July, 1971, all full dues established by the 1967 Convention, or by other provisions of the Constitution and Laws of the Brotherhood applicable to all members under the jurisdiction of each Board of Adjustment and System Division, shall be increased five dollars and fifty cents ($5.50) per member per month, except that no full dues shall be less than eleven dollars ($11.00) per member per month.

There shall be two kinds of dues applicable to members of the Brotherhood. Full dues shall be not less than eleven dollars ($11.00) per member per month of which a minimum of two dollars and sixty cents ($2.60) per member per month shall be retained for State Legislative tax and the use of the lodge; retention of membership dues, which shall be one dollar and fifty cents ($1.50) per member per month, of which forty cents (40c) shall be retained for the use of the lodge. Full dues shall apply to each member who receives pay for forty (40) hours or more in any calendar month on a position in industry over which the Brotherhood claims jurisdiction, or the equivalent compensation under any agreement between an employer and the Brotherhood; to a member promoted to excepted or official positions and a member taking a voluntary leave of absence requiring approval of the organization.

Each Board of Adjustment and System Division is authorized to fix uniform dues (above the minimum of eleven dollars ($11.00) per member

per month) to apply to all members subject to the scope rule of each individual contract under the jurisdiction of the Board of Adjustment or System Division, provided such dues shall be sufficient to meet Grand Lodge per capita tax lawfully approved Board of Adjustment or System Division per capita tax and State Legislative Committee per capita tax, subject to the approval of the International President.

Retention of membership dues shall apply to a member who performs no service in a calendar month due to reduction in force, furlough, military service, sickness, disability, resignation, and a member who receives pay for less than forty (40) hours in any calendar month on a position in industry over which the Brotherhood claims jurisdiction; and a member working in another craft in the industry where he is required to join another union under a Union Shop Agreement.

Members who have retired because of age and who perform no compensated service on a position in industry over which the Brotherhood claims jurisdiction will be classified as associate members, with full rights to participate in the Death Benefit Department, if qualified, receipt of RAILWAY CLERK/interchange, with right to attend lodge meetings of the Brotherhood, except they shall have no vote in the election of officers, or on matters pertaining to wages, rules, working conditions or grievances, and they may retain such membership by the voluntary payment of one dollar and fifty cents ($1.50) per month.

(b) Subordinate units shall be allowed appropriate credit on the quarterly per capita tax report for sick and out-of-work members. The subordinate unit will be billed on per capita tax report for members in military service and members drawing disability pension or age and service pension at the reduced per capita tax rate.

(c) Subordinate units shall not be permitted to waive dues of any member or officer except that members on strike over two (2) weeks and who have not secured other employment shall be exempt from the payment of dues.

(d) In the event of extraordinary circumstances, involving ongoing organizational efforts, new representation, specific national problems, restrictive labor laws, or other unusual circumstances, any subordinate unit may petition the International President for permission to lower the minimum Board of Adjustment, System Division or Local Lodge per capita tax specified herein and elsewhere. The International President may grant such waiver subject to annual review by him, provided that, in his judgment, the needs of the Brotherhood can be adequately met and the circumstances warrant such action.

(e) In the event of extraordinary circumstances involving new organizational efforts, newly acquired representation rights, initial contracts, and situations wherein existing rates of pay or working conditions

are determined to be below the over-all pattern of our Brotherhood, any subordinate unit or units involved may petition the International President for, or the International President may initiate on his motion, a partial reduction of the Grand Lodge per capita tax for the members covered by the respective contract or organizing situation, subject to the approval of the Finance Committee. Reductions so granted shall not extend beyond the term of the initial contract unless resubmitted and approved by the Finance Committee.

Assessments

Section 3. No assessment shall be levied by any subordinate unit except by approval of the International President.

PER CAPITA TAX

Section 4. (a) Grand Lodge per capita tax shall be four dollars and twenty cents ($4.20) per month or twelve dollars and sixty cents ($12.60) per quarter on full dues paying members, except that no per capita tax is payable on new or reinstated members for the quarter in which they apply for membership; one dollar and ten cents ($1.10) per month or three dollars and thirty cents ($3.30) per quarter on reduced dues paying members and shall be apportioned quarterly by the International Secretary-Treasurer to the different funds and fund accounts as follows:

Per Capita Tax on Full Dues Paying Members

General Fund Account (Grand Lodge)	$ 3.10
Protective Fund Account (Grand Lodge)	.75
Convention Fund Account (Grand Lodge)	.60
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
Organization Fund Account (Grand Lodge)	1.25
*Legislative Fund Account (Grand Lodge)	.10
Total	$12.60

*Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third cents (3⅓c) per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues becomes effective with the month following the month in which the member notifies the Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

Retention of Membership Per Capita Tax

General Fund Account (Grand Lodge)	$ .80
Convention Fund Account (Grand Lodge)	.60
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
*Legislative Fund Account (Grand Lodge)	.10
Total	$3.30

*Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third cents (3⅓c) per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues becomes effective with the month following the month in which the member notifies his Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

Associate Membership
Per Capita Tax

General Fund Account (Grand Lodge)	$ .75
Convention Fund Account (Grand Lodge)	.00
Death Benefit Fund (Grand Lodge)	1.20
Official Publication Fund Account (Grand Lodge)	.60
*Railway Clerks Political League	.75
Total	$3.30

*Any Associate member who does not desire to make a voluntary contribution to Railway Clerks Political League may have his dues reduced 25c per month by notifying his Financial Secretary in writing and making his payment direct to said Secretary. Reduction in dues will become effective with the month following the month in which the Associate member notifies his Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of the notice.

NOTE: An Associate member is a member who has retired because of age and who performs no compensated service on a position in industry over which the Brotherhood claims jurisdiction, and per capita tax received on him is only allocated to those funds in which he has an interest or from which he receives service. The purpose of the voluntary contribution to Railway Clerks Political League is to advance and protect his interest through political activity in the legislative field and in particular to work for improvement of retirement systems established and maintained under law.

(b) Grand Lodge per capita tax is payable quarterly in the month following the close of each calendar quarter. Tax for the first quarter of each calendar year is payable in April; second quarter tax in July; third quarter tax in October, and fourth quarter tax in January. Failure of a subordinate unit to pay Grand Lodge tax within the time specified above subjects it to suspension. Members in good standing of such suspended subordinate unit may transfer to another subordinate unit.

(c) Per capita tax advanced on members who are not subject to suspension under the provisions of Article 6, Section 1, of the Lodge Statutes or the By-Laws of other subordinate units, at the time quarterly per capita tax report is made to the International Secretary-Treasurer, shall upon proper certification be credited to the lodge or subordinate unit by the International Secretary-Treasurer for any month of the current quarter and the last month of the previous quarter for which dues were not paid.

Board of Adjustment Per Capita Tax

(d) Board of Adjustment and System Division per capita tax shall be not less than four dollars and twenty cents ($4.20) per member per month.

Section 5. All monies received by the International Secretary-Treasurer shall be deposited in the General Fund of the Brotherhood and each of the above fund accounts shall be credited with its proportion of the fees and dues as provided above, and separate records kept of each fund and fund account; provided, however, the Death Benefit Fund shall be maintained separate and apart from all other fund accounts of the Brotherhood.

Section 6. The International Secretary-Treasurer shall be the custodian of all funds.

EXHIBIT I

POLICY STATEMENT OF THE BRAC ISSUED BY THE INTERNATIONAL PRESIDENT AND APPROVED BY THE EXECUTIVE COUNCIL

SUBJECT: Procedure Providing Reductions In Dues and Agency Fees To Members And Non-Members Who Object To The Use Of Their Union Dues Or Agency Fees For Political Purposes Not Germane To Collective Bargaining.

REASON FOR ADOPTION OF THE POLICY STATEMENT: In 1963, the United States Supreme Court rendered its decision in the case of *BRAC v. Allen* (1963) 373 U.S. 113. That decision held that objecting members of a labor union were entitled to a reduction in their dues obligations in the same proportion that total union expenditures for political purposes not germane to collective bargaining bore to total union expenditures. In so ruling, the Court recognized the right of unions to expend dues and agency fees collected pursuant to collective bargaining agreements in support of all activities germane to collective bargaining and to expend non-dissenters' dues and fees for political purposes not germane to collective bargaining. Only the expenditures of dissenters' dues and fees for political purposes not germane to collective bargaining were subject to the refund. Unions were urged by the Court to adopt voluntary internal procedures to accomplish the refunds without the necessity of judicial recourse.

Although most of the funds this union expends on political purposes not germane to collective bargaining are raised through voluntary contributions to the Railway Clerks Political League (expenditures to or in behalf of candidates for Federal office are made from these voluntary contributions), some such political expenditures are made from dues and agency fees. While the Supreme Court has recognized the legality of these expenditures from union dues and fees, the Court has also recognized the right of dissenters not to pay mandatory dues and fees which are expended for political purposes not germane to collective bargaining.

This union was a party in the *Allen* case and, in an effort to comply with the mandate of the Court, we adopted the dues reduction procedure presently embodied in Article 27, Section 4(a) of the Constitution of the Grand Lodge. Three and one-third cents per month was thought to constitute an approximation of the dues reduction required by the United States Supreme Court.

Recent developments have suggested the necessity for adoption of a policy expanding and clarifying the dues reduction procedure. Certain members of our union and certain non-members paying agency fees instituted a lawsuit seeking, among other relief, to compel the adoption of a procedure which would permit objecting members and non-members to recover that proportion of their dues and agency fees being spent on political purposes not germane to collective bargaining to which they had objection. In addition to the lawsuit, confusion regarding the availability of the three and one-third cent dues reduction to non-members paying agency fees suggested the necessity for clarification and expansion of the policy on dues reductions. Furthermore, it is recognized that the allocation made some years ago may no longer correlate with actual expenditures of dues and fees for political purposes not germane to collective bargaining.

POLICY: The following policy statement is declared by the International President and the Executive Council, to be applicable to members and non-members in the United States paying dues or agency fees, effective January 1, 1974:

1. Any member or non-member who pays dues or agency fees pursuant to a collective bargaining agreement shall have the right to object to the expenditure of a portion of his dues or agency fees for political purposes not germane to collective bargaining.

2. Expenditures for political purposes not germane to collective bargaining shall include the following expenditures:

(a) Expenditures for payments to or on behalf of any candidate for public office in connection with said candidate's campaign for election to such public office.

(b) Expenditures to or on behalf of any political party or political organization.

(c) Expenditures for the holding of any meeting or printing or distribution of any literature or documents in support of or opposition to any such candidate, political party, or political organization.

(d) Expenditures to or on behalf of any organization which espouses a political viewpoint or ideology for purposes not germane to

collective bargaining.

3. The board of Trustees of the Grand Lodge shall review the records of the union maintained by the International Secretary-Treasurer and shall determine the amount of receipts from dues and agency fees expended for political purposes not germane to collective bargaining by this union, including specifically such expenditures by the Grand Lodge, the System Boards of Adjustment, the State Legislative Committees, and the Local Lodges, in each of the past three years. The figures for each year of the last three shall be added together and divided by three to determine the average expenditure for political purposes not germane to collective bargaining.

4. The Board of Trustees of the Grand Lodge shall likewise compute the average receipts from dues and agency fees by computing the total receipts from dues and agency fees in each year of the last three years, adding the figures for each year together, and dividing that sum by three.

5. The Board of Trustees of the Grand Lodge shall then compute the proportion of the average receipts of dues and agency fees which is expended on political purposes not germane to collective bargaining by dividing the average expenditures for political purposes not germane to collective bargaining by the average receipts of dues and agency fees.

6. The above described computations by the Board of Trustees shall be made annually in the month of February, using the figures for the preceding three years. If the ratio of expenditures for political purposes not germane to collective bargaining to receipts of agency fees and dues, when multiplied by the monthly dues or agency fee obligation of an objecting member or non-member, is less than three and one-third cents per month, the amount of the dues reduction shall nevertheless be three and one-third cents per month.

7. Any member or non-member who perfects such an objection to the expenditure of dues or agency fees for political purposes not germane to collective bargaining shall be entitled to a reduction in such dues or agency fee obligation in the same proportion that average expenditures for political purposes not germane to collective bargaining bears to average receipts of dues and agency fees.

8. Any member paying dues or non-member paying agency fees may perfect such an objection by individually notifying the Financial

Secretary of the Local Lodge or the General Secretary and Treasurer of the System Division to which dues and fees are paid by certified or registered mail, provided, however, that such objection shall be timely during the first thirty days of union membership and during the first thirty days of each calendar year, except as provided in paragraph 10. An objection may be continued from year to year only if renewed during the thirty day period at the beginning of each year. Objecting members and agency fee payers who pay their dues or agency fees directly to their Local Lodge Financial Secretary or to their System Division General Secretary and Treasurer shall be entitled to a reduction in their dues or agency fees of that proportion of their monthly dues and agency fees which is the same as the ratio of average expenditures for political purposes not germane to collective bargaining to average receipts of dues and fees. Objecting members and agency fee payers who wish to pay their dues or agency fees through a company check-off shall receive an annual refund of that proportion of their dues and agency fees which is the same as the ratio of average expenditures for political purposes not germane to collective bargaining to average receipts of dues and fees.

9. If an objecting member or agency fee payer is dissatisfied with the proportional allocation made by the Board of Trustees of the Grand Lodge, said individual may appeal the ruling to the International President. If the objector is then dissatisfied with the decision of the International President, said individual shall have the right of an appeal to the Executive Council and, thereafter, if still dissatisfied, of an appeal to the Convention.

10. Any objecting dues paying member or non-member paying agency fees, who has filed an objection with the Local Lodge or System Division prior to the adoption of this policy statement, shall have said objection honored retroactively from the date of the original objection, provided such objecting member or non-member files with the Financial Secretary of the Local Lodge or General Secretary and Treasurer of the System Division a copy of the original objection along with a current objection; if a copy of the original objection is unavailable, the objecting member or non-member may file a statement declaring the date and content of the prior objection and the unavailability of a copy thereof along with a current objection. Renewal of prior objections, as well as new objections by members and non-members who had not previously objected, shall be timely if filed within ninety days of the effective date of this policy statement. Otherwise, objections shall be timely only as provided in paragraph 8.

Issued this 24th day of January 1974.

By: C. L. Dennis

C. L. Dennis
International President

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALLEN FAILS, JACK FROST, TWILA JOHNSON, BRENT ERKMAN, HELENE TAYLOR, CANDICE BROWN, GAYLE NELSON, JANIS DAMANTE, AUDREY RYAN, MARY ANN GROTE, SHIRLEY BALLARD, LOA YOUNG, MARGUERITE DOUGLAS, JOYCE EMMINGER and KENNETH WISOR, Plaintiffs, vs. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD OF RAILWAY, AIRLINE AND	CIVIL NO. 73-118-N ANSWER TO FIRST AMENDED COMPLAINT

STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES SYSTEM BOARD OF ADJUSTMENT NO. 451, AIR TRANSPORT DIVISION; CALIFORNIA STATE LEGISLATIVE COMMITTEE OF THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; SKYLINER LODGE LOCAL 3001; SKYHARBOR LODGE LOCAL 3014; and ARROWLINER LODGE LOCAL 3049,

Defendants.

Defendants Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes System Board of Adjustment No. 451, Air Transport Division; California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Skyliner Lodge Local 3001; Skyharbor Lodge Local 3014; and Arrowliner Lodge Local 3049 (hereinafter collectively referred to as "BRAC"), for answer to the first amended complaint on file herein, admit, deny and allege as follows:

1. In answer to the allegations of paragraph 1, defendants deny each and every allegation contained in said paragraph.

2. In answer to the allegations of paragraphs 2 and 3, defendants admit the allegations contained therein.

3. In answer to the allegations of paragraph 4, defendants admit that the California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees is an unincorporated association, subsidiary to and affiliated with the BRAC, that the Committee has as its purpose, in part, the sponsorship of legislation in the state of California, and that the Committee's activities are supported financially by thirty cents per

month from the compulsory dues and fees paid by plaintiffs and others. Except as otherwise expressly admitted, defendants specifically deny each and every allegation of paragraph 4. Defendants further deny that plaintiffs, or any of them, do or can represent any class.

4. In answer to the allegations of paragraph 5, defendants admit the allegations contained therein.

5. In answer to the allegations of paragraph 6, defendants admit that, at all times material hereto, Western has maintained a collective bargaining relationship with BRAC governing the terms and conditions of employment of plaintiffs and that BRAC was and is the exclusive bargaining agent for the craft or class of employees in which plaintiffs are employed. Defendants deny that plaintiffs, or any of them, do or can represent any class, and, except as otherwise expressly admitted, defendants specifically deny each and every allegation of paragraph 6.

6. In answer to the allegations of paragraphs 7 and 8, defendants admit that the agreements attached to the complaint as Exhibits A, B, and C are agreements executed by BRAC and Western and that said agreements set forth terms and conditions relating to the obligations of employees with respect to BRAC. Except as expressly admitted, defendants deny each and every allegation of paragraphs 7 and 8.

7. In answer to the allegations of paragraph 9, defendants admit that plaintiffs refer in their complaint to the union security provisions of the collective bargaining agreement as "compulsory union membership agreement."

8. In answer to the allegations of paragraph 10, defendants admit that plaintiffs Emminger, Wisor, Young, Taylor, Douglas and Fails were advised by BRAC that their employment with Western would be terminated if they refused to pay BRAC an initiation fee and monthly dues. Defendants further admit that the aforesaid plaintiffs were so advised by a letter dated March 1, 1971, an example of which is attached to the complaint as Exhibit D. In answer to the allegations that Western advised plaintiffs and the class they purport to represent that their employment with Western would be terminated if they refused to pay BRAC an initiation fee and monthly dues, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations and, placing their denial on that ground, deny each and every such allegation. Defendants further deny that plaintiffs do or can

represent any class, and, except as expressly admitted, defendants deny each and every allegation of paragraph 10.

9. In answer to the allegations contained in the first sentence of paragraph 11, defendants admit the allegations contained therein. In answer to the allegations contained in the second sentence of paragraph 11, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of said allegations and, placing their denial on that ground, deny each and every such allegation. Defendants further deny that plaintiffs do or can represent any class, and, except as expressly admitted, defendants deny each and every allegation of paragraph 11.

10. In answer to the allegations of paragraph 12, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, placing their denial on that ground, deny each and every such allegation.

11. In answer to the allegations of paragraph 13, defendants admit that plaintiffs Taylor, Brown, Nelson, Ryan, Grote, Young, Douglas, Emminger, and Wisor mailed to defendants a letter substantially in the form quoted in paragraph 13. Except as otherwise expressly admitted, defendants allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 13, and, placing their denial on that ground, deny each and every such allegation. Defendants further deny that plaintiffs are members and representatives of a class of Western employees.

12. In answer to the allegations of paragraph 14, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and, placing their denial on that ground, deny each and every such allegation. Defendants further deny that plaintiffs do or can represent any class.

13. In answer to the allegations of paragraph 15, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and, placing their denial on that ground, deny each and every such allegation.

14. In answer to the allegations of paragraphs 16, 17, 18, 19, 20, 21, and 22, defendants deny each and every such allegation.

COUNT I

15. In answer to the allegations incorporated by reference in paragraph 23 of the complaint, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 14 above.

16. In answer to the allegations of paragraphs 24, defendants admit that dues and fees monies have been used in part for the activities described in sub-paragraph (C). Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 24.

17. In answer to the allegations of paragraph 25, defendants deny each and every allegation contained therein.

18. In answer to the allegations of paragraph 26, defendants admit that the Railway Labor Act authorizes the designation of BRAC as exclusive bargaining agent for all employees in the collective bargaining unit in which plaintiffs are employed, and empowers BRAC and Western to enter into the form of union security agreement described in paragraphs 7 and 8 of the complaint. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 26.

COUNT II

19. In answer to the allegations incorporated by reference in paragraph 27, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 14 and 16 through 18 above.

20. In answer to the allegations of paragraph 28, defendants admit that, as the statutory exclusive bargaining representative of plaintiffs, BRAC owes each of them the fiduciary duty of fair representation. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 28.

COUNT III

21. In answer to the allegations incorporated by reference in paragraph 29, defendants incorporate herein by this reference each and every admission, denial and allegation of paragraphs 1 through 14, 16 through 18, and 20 above.

22. In answer to the allegations of paragraph 30, defendants admit each and every such allegation.

23. In answer to the allegations of paragraph 31, defendants deny each and every such allegation.

24. In answer to the allegations of paragraph 32, defendants admit that the dues reduction procedure set forth in paragraph 30 provides for no reduction of the initiation fees. Defendants further admit that Article 27, Section 4(a) of the BRAC constitution provides that three and one-third cents per month from each member's dues shall be applied to the Legislative Fund Account (Grand Lodge). Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 32.

25. In answer to the allegations of the Conclusion, defendants deny each and every allegation contained therein.

COUNT IV

26. In answer to the allegations incorporated in paragraph 33, defendants incorporate herein by this reference each and every admission, denial and allegation in paragraphs 1 through 14, 16 through 18, 20, and 22 through 24 above.

27. In answer to the allegations of paragraph 34, defendants admit that, at the Convention in 1967, a dues reduction procedure was adopted as part of the dues structure and was set forth in the constitution as amended at the said Convention. Defendants further admit that a copy of a portion of the proceedings from the 1967 Convention is attached as Exhibit F to the complaint. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 34.

28. In answer to the allegations of paragraph 35, defendants admit that, at the Convention in 1971, the dues reduction procedure was revised and that the procedure was set forth in the constitution as amended at the 1971 Convention. Defendants further admit that a copy of a portion of the proceedings of the 1971 Convention is attached as Exhibit G to the amended complaint. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 35.

29. In answer to the allegations of paragraph 36, defendants admit that, under Article 34, Section 1 of the BRAC constitution, constitutional amendments may be accomplished at a convention and by referendum. Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 36.

30. In answer to the allegations of paragraph 37, defendants admit that their International President issued a Policy Statement, a copy of which is attached as Exhibit I to the amended complaint; that Article 13, Section 2 of the BRAC constitution provides in part that the International President shall "enforce strict observance of the Constitution, laws, rules and regulations of the Brotherhood."; that Article 13, Section 3 provides in part that the International President "shall at all times strictly enforce the Grand Lodge Constitution, Statutes For The Government Of Lodges, Protective Laws, and T.C. Division By-Laws of the Brotherhood and shall call to account any member or members of the Brotherhood violating the same."; that Article 13, Section 4 of the BRAC constitution provides that the International President "shall have the sole power and authority to interpret the Constitution and laws, subject to appeal to the Executive Council, and shall advise the membership through RAILWAY CLERK/interchange of any such interpretations issued, and may issue dispensation not inconsistent with said Constitution and laws."; and that Article 5, Section 2(a) of the BRAC constitution provides in part that:

> "It is the obligation and responsibility of every officer, subordinate unit and member to comply with the Constitution, Statutes For the Government Of Lodges, Protective Laws and T.C. Division By-Laws of this Brotherhood and the orders of its officers when in conformity therewith. . . ."

Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 37.

31. In answer to the allegations of paragraph 38, defendants deny each and every said allegation.

32. In answer to the allegations of paragraph 39, defendants admit that plaintiffs propounded interrogatories on January 21, 1974; that on January 24, 1974 the Policy Statement was issued effective January 1, 1974; that International President Dennis sent a copy of the Policy Statement to each member of the Executive Council for his approval and instructed each member by letter that "It is imperative that prompt action

be taken on this matter and that your approval or disapproval be received before February 1, 1974."; and that by letter dated February 14, 1974, International President Dennis instructed all Local Lodge financial secretary-treasurers in the United States to mail copies of the Policy Statement to agency fee payers for whom the Grand Lodge did not have correct addresses and that, as part of these instructions, International President Dennis stated "This matter should take precedence over any other duty you may have as Financial Secretary-Treasurer of your Lodge." Except as otherwise expressly admitted, defendants deny each and every allegation contained in paragraph 39.

33. In answer to the allegations of paragraph 40, defendants deny each and every said allegation.

34. In answer to the allegations of paragraph 41, defendants admit the allegation in sub-paragraph B that the Policy Statement, on its face, does not encompass payments plaintiffs are compelled to make in the form of initiation fees and assessments; defendants admit the allegation of sub-paragraph G that the persons serving on the Appeals Committee of the Convention are appointed by BRAC's International President subject to ratification by the Convention; defendants admit the allegations of sub-paragraph H that no time limitations are provided in the Policy Statement and that conventions are scheduled four years apart; defendants admit the allegations of sub-paragraph I that International President Dennis has stated that plaintiffs may not be presented on appeal by an attorney, unless such an attorney is a BRAC member, and that International President Dennis has stated that there are only approximately fifteen to twenty-five such attorneys in the United States who do not serve in a representative capacity for the union, which has approximately 200,000 members in the United States; defendants admit the allegations of sub-paragraph J insofar as that sub-paragraph alleges that the International President has stated that all expenses incurred by an objector in his appeal must be borne by the objector, even if he succeeds in his appeal; defendants admit that sub-paragraphs (1) through (4) of sub-paragraph K correctly summarize some of the provisions of the Policy Statement and further admit the allegations of sub-paragraph (5) of sub-paragraph K except for the last sentence of said sub-paragraph.

Except as otherwise expressly admitted, defendants deny each and every allegation of paragraph 41 and its sub-paragraphs.

35. In answer to the allegations of paragraphs 42, 43, and 44, defendants deny each and every said allegation.

AS FOR THEIR FIRST AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

36. The amended complaint fails to state a claim upon which relief can be granted in Count I, Count II, Count III, or Count IV, or any of them.

AS AND FOR THEIR SECOND AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

37. Plaintiffs have failed to attempt to exhause internal and administrative remedies available to them.

AS AND FOR THEIR THIRD AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

38. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 337, subdivision (1).

AS AND FOR THEIR FOURTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

39. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 338, subdivision (1).

AS AND FOR THEIR FIFTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

40. The causes of action attempted to be set forth, and each of them, are barred by the statute of limitations provided under California Code of Civil Procedure, Section 343.

AS AND FOR THEIR SIXTH AFFIRMATIVE DEFENSE HEREIN, DEFENDANTS ALLEGE:

41. Insofar as the amended complaint and Counts I, II, III, and IV, and each of them, allege a claim arising out of the interpretation or

application of the collective bargaining agreement between BRAC and Western Air Lines, said amended complaint and Counts I, II, III, and IV, and each of them, are preempted by the provisions of the Railway Labor Act, 45 U.S.C., Section 184, and within the exclusive jurisdiction of the System Board of Adjustment.

WHEREFORE, defendants pray:

(1) That plaintiffs, and each of them, take nothing by their action;

(2) For costs of suit incurred herein; and

(3) For such other and further relief as the Court deems just and proper.

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SOUTHERN DISTRICT OF CALIFORNIA
BY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALLEN FAILS, et al, Plaintiffs, vs. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, etc., et al, Defendants.	CIVIL NO. 73-118-N STIPULATION AND ORDER FOR CONSOLIDATION

IT IS HEREBY STIPULATED by and between plaintiffs and defendants, through their respective attorneys, that Civil Action No. 73-118-N, "Allen Fails, et al, v. Brotherhood of Railway, Airline & Steamship Clerks, etc., et al", shall be consolidated with Civil Action No. 73-113-N, "Howard Ellis, et al v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al".

The parties have entered into this stipulation because the two actions involve similar questions of fact and law and are pending before the same Court.

Dated: February 1, 1974

BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
GEORGE E. BODLE
STEPHEN REINHARDT
JOEL N. KLEVENS

HIGHSAW and MAHONEY
JAMES L. HIGHSAW

WILLIAM J. DONLON

By _____
Joel N. Klevens
Attorneys for Defendants

Dated: February ____, 1974

MICHAEL E. MERRILL
RAYMOND J. LA JEUNESSE, JR.
THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

JONATHAN C. GIBSON
GIBSON & KENNERSON

JOHN L. KILCULLEN
GALL, LANE, POWELL & KILCULLEN

By _____
Jonathan C. Gibson
Attorneys for Plaintiffs

ORDER

Good cause appearing therefor, IT IS SO ORDERED:

Dated: 2-5-74

_____
United States District Judge

BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
GEORGE E. BODLE
STEPHEN REINHARDT
JOEL N. KLEVENS
5900 Wilshire Blvd., Suite 2600
Los Angeles, California 90036
(213) 937-6250

FILED
FEB 5 - 1974
CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY

HIGHSAW and MAHONEY
JAMES L. HIGHSAW
1015 18th Street, N.W., Suite 506
Washington, D.C. 20036
(202) 833-2020

WILLIAM J. DONLON
6300 River Road
Rosemont, Illinois 60018
(312) 692-7711

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al, Plaintiffs, vs. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al, Defendants.	CIVIL NO. 73-113-N STIPULATION AND ORDER FOR CONSOLIDATION

IT IS HEREBY STIPULATED by and between plaintiffs and defendants, through their respective attorneys, that Civil Action No. 73-113-N, "Howard Ellis, et al v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al", shall be consolidated with Civil Action No. 73-118-N, "Allen Fails, et al, v. Brotherhood of Railway, Airline & Steamship Clerks, etc., et al".

The parties have entered into this stipulation because the two actions involve similar questions of fact and law and are pending before the same Court.

Dated: February 1, 1974

BODLE, FOGEL, JULBER, REINHARDT and ROTHSCHILD
GEORGE E. BODLE
STEPHEN REINHARDT
JOEL N. KLEVENS

HIGHSAW and MAHONEY
JAMES L. HIGHSAW

WILLIAM J. DONLON

By _____
Joel N. Klevens
Attorneys for Defendants

Dated: February ____, 1974

MICHAEL E. MERRILL
RAYMOND J. LA JEUNESSE, JR.
THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

JONATHAN C. GIBSON
GIBSON & KENNERSON

JOHN L. KILCULLEN
GALL, LANE, POWELL & KILCULLEN

By _____
Jonathan C. Gibson
Attorneys for Plaintiffs

ORDER

Good cause appearing therefor, IT IS SO ORDERED.

Dated: 2-5-74

_____
United States District Judge

MICHAEL E. MERRILL
RAYMOND J. LaJEUNESSE, JR.
The National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Boulevard
Suite 600
Fairfax, Virginia 22030
(703) 573-7010

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JOHN L. KILCULLEN
Webster, Kilcullen & Chamberlain
1747 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
(202) 785-9500

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N SUPPLEMENTAL AFFIDAVIT OF IRVING B. ROSS
ALLAN FAILS, et al., Plaintiffs, v.	

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

I. IRVING B. ROSS, being first duly sworn, do hereby depose and say:

1. That I am Irving B. Ross, Certified Public Accountant, and that the following information supplements my affidavits of October 16, 1974 and August 26, 1975. This affidavit is based upon persona [*sic*] knowledge that I could competently testify to, if called as a witness herein. The statements and opinions herein are predicated upon my personal review of the documents described below, as well as my education, training, and experience in the accounting profession.

Proposed Revision of BRAC Accounting System

2. The reports of Haskins & Sells dated February 3, 1975, April 3, 1975, and April 15, 1975 (Exhibits A, B and C attached hereto) deal with the proposed establishment of an "automated funds accounting and processing system." The implementation of the systems described, if accomplished, would bring about no ascertainable improvement in the ability to establish with reasonable accuracy the extent of collective bargaining versus non-collective bargaining costs. The proposed system will not isolate costs of collective bargaining, non-collective bargaining, or political costs. Therefore, the conclusion stated in paragraph number 7 of my affidavit dated August 26, 1975 remains unchanged, even in the event that BRAC implements the accounting system recommended by Haskins & Sells.

Board of Trustees Report - 1974

3. The report of the BRAC Board of Trustees applicable to calendar year 1974 (Exhibit D attached hereto) is subject to essentially the same inadequacies described in my affidavits dated October 16, 1974 and August 26, 1975; and the trustees' computations of BRAC's expenditures for "political purposes not germane to collective bargaining" are, in my opinion, inherently unreliable.

RCPL - COPE - BRAC - Fund Transfers

4. The Haskins & Sells audited financial statements of BRAC for the six months ended June 30, 1972 (Exhibit #3 to Wende deposition of December 17, 1974) include under General Fund Unappropriated Revenues the receipt of $100,000 from the AFL-CIO. A review of all BRAC supporting documents relating to these revenues reveals the following:

a) On May 19, 1972 a $50,000 check was drawn on the Railway Clerks Political League (RCPL) account made payable to the AFL-CIO Committee on Political Education (COPE). (See Exhibits E, F, and G attached hereto).

b) Three days later COPE drew a check from its Educational Fund payable to the RCPL (Exhibit H attached hereto).

c) The BRAC International Secretary-Treasurer, D. J. Sullivan acknowledged receipt of such funds on behalf of the RCPL on June 1, 1972. (Exhibit I attached hereto).

d) On June 6, 1972 the BRAC International President, C. L. Dennis instructed Mr. Sullivan to deposit the $50,000 received from COPE into BRAC's General Fund. (Exhibit J attached hereto).

e) On June 7, 1972 a second $50,000 check was drawn on the account of the RCPL payable to COPE. (Exhibits K, L and M attached hereto).

f) Two days later COPE drew its own check for $50,000 from its Educational Fund payable this time to BRAC as a contribution. (Exhibit N attached hereto).

g) D. J. Sullivan acknowledged the second $50,000 on June 13, 1972 in the name of BRAC. (Exhibit O attached hereto).

5. Although BRAC's audited financial statements indicated the source of the $100,000 to be the "AFL-CIO" the true source of the funds was the Educational Fund of COPE.

6. The net effect of these transfers are as follows:

a) Members of BRAC who voluntarily contributed $100,000 to the Railway Clerks Political League had their funds ultimately deposited in the General Fund of the Brotherhood of Railway and Airline Clerks.

b) The Committee on Political Education took $100,000 from its Education Fund which:

(1) it received through per capita assessments from its member affiliates; and

(2) in exchange for this $100,000 (which is restricted by law from being used for contributions to political candidates for federal office), COPE substituted $100,000 of RCPL's "voluntary" money which then could be used without restriction. The substituted funds were receipted by COPE's "POLITICAL CONTRIBUTIONS COMMITTEE-N FUND."

Irving B. Ross

Subscribed and sworn to before me
this 3rd day of October, 1975

NOTARY PUBLIC

My Commission Expires February 25, 1979

(Proof of service omitted in printing.)

EXHIBIT E

May 19, 1972

Committee on Political Education
815 - 16th Street, N. W.
Washington, D. C. 20006

Attention: Mr. Walter Bartkin

Dear Mr. Bartkin:

Enclosed is check No. 1200 drawn on our Railway Clerks Political League account in the amount of $50,000.00, made payable to the Committee on Political Education.

This account is voluntary contributions collected from our membership.

Please furnish us with a receipt in like amount in order for us to comply with the provisions of the Corrupt Practices Act.

Sincerely and fraternally,

Chairman

Enclosure

EXHIBIT F

RAILWAY CLERKS POLITICAL LEAGUE
6300 RIVER RD.
ROSEMONT, ILL. 60018

1200

May 19, 1972 70-2312
711

PAY TO THE ORDER OF COPE - Committeeon Political Education $ 50,000.00

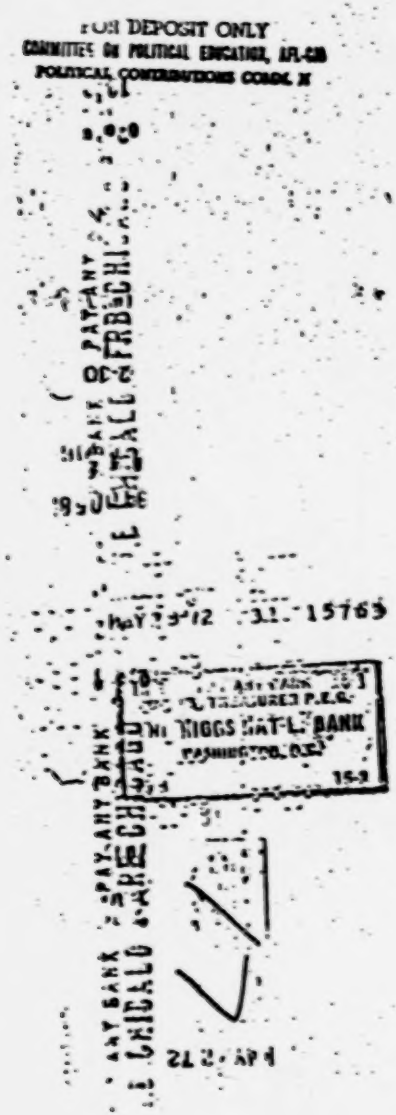
Fifty-thousand and 00/100 DOLLARS

NATIONAL BANK OF SCHILLER PARK
SCHILLER PARK, ILLINOIS

D. J. Fullmer

E. J. Dawson

⑆071123151⑆ 41-765-3 ⑈0005000000⑈


FOR DEPOSIT ONLY
COMMITTEE ON POLITICAL EDUCATION, AFL-CIO
POLITICAL CONTRIBUTIONS COMM. #
PAY ANY BANK
ANY BANK PAY ANY
31-15765
NIGGS NAT'L BANK
WASHINGTON, D.C.
PAY ANY BANK
ANY BANK

JA-182

EXHIBIT G

No. 415 N 1200 Washington, D.C. May 22, 1972

Received from Railway Clerks Political League

City _____ State _____

the sum of $50,000.00

as a voluntary contribution to COMMITTEE ON POLITICAL EDUCATION, AFL-CIO, POLITICAL CONTRIBUTIONS COMMITTEE—N FUND. We gratefully acknowledge your remittance.

C. L. Dennis, Chairman
Railway Clerks Political League
6300 River Road
Rosemont, Ill. 60018

Very truly yours,

Sec.-Treasurer, COPE, AFL-CIO

PCC N FUND

EXHIBIT H

Committee on Political Education

AIR MAIL

May 22, 1972

PRESIDENT'S OFFICE
BH
MAY 24 1972

Mr. C. L. Dennis, President
Brotherhood of Railway, Airline and
Steamship Clerks
O'Hare International Transportation Center
6300 River Road
Rosemont, Illinois 60018

Dear President Dennis:

Enclosed is our check # 9080 drawn on our Educational Fund in the amount of $50,000.00, made payable to the Railway Clerks Political League as a contribution.

In order to comply with the provisions of the Corrupt Practices Act it is necessary for us to have a receipt in like amount.

Fraternally yours,

Al Barkan
Alexander E. Barkan
National Director

jh
opeiu # 2
afl-cio
Enclosure

EXHIBIT I

File: ST-293

June 1, 1972

Mr. Alexander E. Barkan
815 16th Street, N.W.
Washington, D.C. 20006

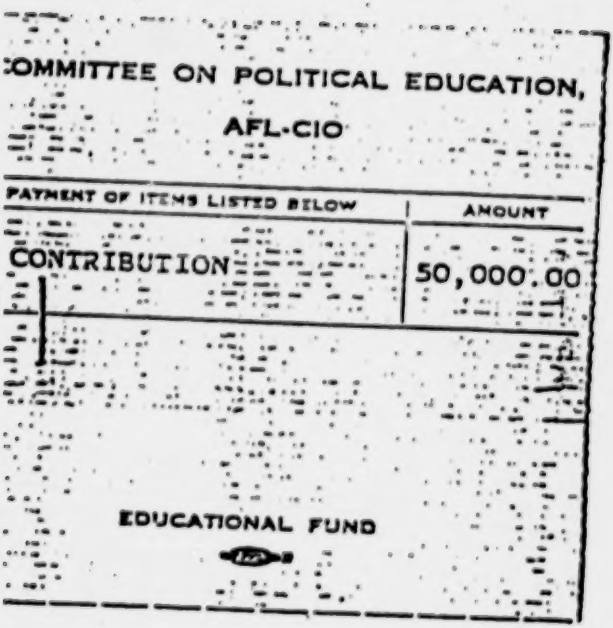
Dear Brother Barkan:

With reference to your letter of May 22, 1972, accompanied by your check # 9080 in the amount of $50,000.00 representing your contribution to the Railway Clerks Political League, please find enclosed our receipt # 4896 dated June 1, 1972.

Sincerely and fraternally,

International Secretary-Treasurer

cc: C. L. Dennis, IP



COMMITTEE ON POLITICAL EDUCATION,

AFL-CIO

PAYMENT OF ITEMS LISTED BELOW	AMOUNT
CONTRIBUTION	50,000.00

EDUCATIONAL FUND

EXHIBIT J

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
AFL-CIO—CLC **C. L. DENNIS International President**

Subject: Railway clerks
Political League

June 6, 1972

Mr. D. J. Sullivan, IST
6300 River Road
Rosemont, Illinois 60018

Dear Sir and Brother:

I acknowledge receipt of copy of your letter dated June 1, 1972, file ST-293 addressed to Mr. Alexander E. Barkan, acknowledging receipt of $50,000.00.

It is noted that you have acknowledged these funds on behalf of the Railway Clerks Political League and apparently would deposit same in the bank to the RCPL fund. RCPL funds received from the membership are the only funds which should be credited to that account, and this amount from the AFL-CIO should not be intermingled in the RCPL fund.

Therefore, this amount of $50,000.00 should be placed to the credit of the General Fund account and I would ask that you make certain that our records reflect this transaction in this manner.

Sincerely and fraternally,

C. L. Dennis

International President

EXHIBIT K

June 7, 1972

Committee on Political Education
AFL-CIO
815-16th Street, N.W.
Washington, D. C. 20006

Attention Mr. Walter Bartkin

Dear Mr. Bartkin:

Enclosed is check No. 1213 drawn on our Railway Clerks Political League account in the amount of $50,000.00, made payable to the Committee on Political Education. This account is voluntary contributions collected from our membership.

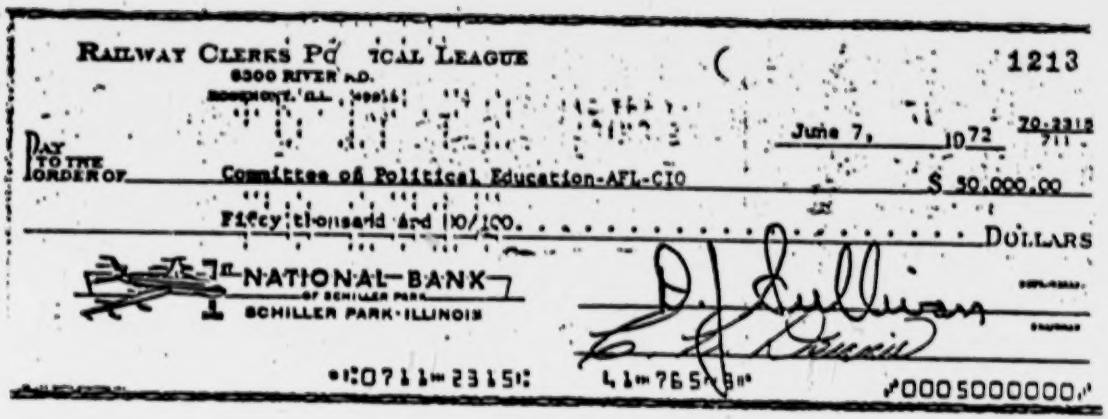
Please furnish us with a receipt in like amount in order for us to comply with the provisions of the Corrupt Practices Act.

Sincerely and fraternally,

Chairman

Enclosure

EXHIBIT L



RAILWAY CLERKS POLITICAL LEAGUE
8300 RIVER RD.
[illegible]

1213

June 7, 1072 70-2318

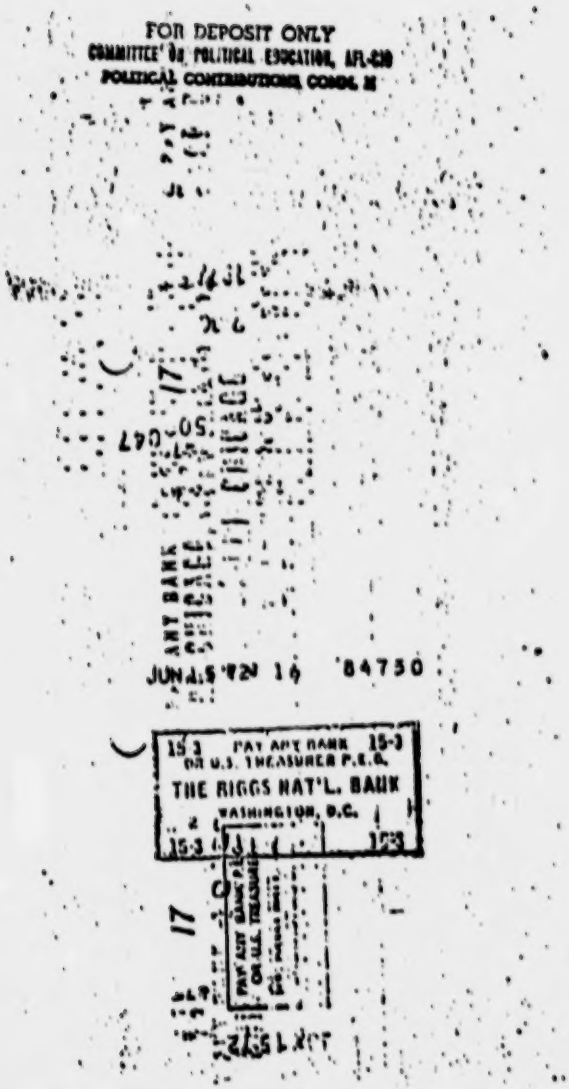
PAY TO THE ORDER OF Committee of Political Education-AFL-CIO $ 50,000.00

Fifty thousand and 00/100. . . . . DOLLARS

NATIONAL BANK
OF SCHILLER PARK
SCHILLER PARK · ILLINOIS

⑆0711⑈2315⑆ 41⑈7655⑈8 ⑈0005000000⑈

L-2


FOR DEPOSIT ONLY
COMMITTEE ON POLITICAL EDUCATION, AFL-CIO
POLITICAL CONTRIBUTIONS, CONGR. M
PAY ANY BANK
JUN 15 '72 16 84750
15-3 PAY ANY BANK 15-3
OR U.S. TREASURER P.E.C.
THE RIGGS NAT'L. BANK
WASHINGTON, D.C.
PAY ANY BANK OR U.S. TREASURER

JA-190

EXHIBIT M

No 578 N Washington, D. C. June 14, 1976

Received from Railway Clerks Political League

City _____ State _____

the sum of $50,000 00 #121

as a voluntary contribution to COMMITTEE ON POLITICAL EDUCATION, AFL-CIO, POLITICAL CONTRIBUTIONS COMMITTEE—N FUND. We gratefully acknowledge your remittance.

G. L. Denis, Chairman
Railway Clerks Political League
6300 River Road
Rosemont, Ill. 60018

Very truly yours,

Sec.-Treasurer, COPE, AFL-CIO
PCC N FUND

EXHIBIT N

Committee on Political Education

AIR MAIL

June 9, 1972

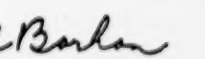
Mr. C. L. Dennis, President
Brotherhood of Railway, Airline and
Steamship Clerks
O'Hare International Transportation
Center
6300 River Road
Rosemont, Illinois 60018

Dear President Dennis:

Enclosed is our check # 9150 drawn on our Educational Fund in the amount of $50,000.00, made payable to the Brotherhood of Railway and Airline Clerks as a contribution.

In order to comply with the provisions of the Corrupt Practices Act it is necessary for us to have a receipt in like amount.

Fraternally yours,



Alexander E. Barkan
National Director

jh
opeiu # 2
afl-cio
Enclosure

EXHIBIT O

File: St-293

June 13, 1972

Mr. Alexander E. Barkan
815 16th Street, N.W.
Washington, D. C. 20006

Dear Brother Barkan:

With reference to your letter of June 9, 1972, accompanied by your check #9150 in the amount of $50,000.00 representing your contribution to the Brotherhood of Railway and Airline Clerks, please find enclosed our receipt #5232 dated June 13, 1972.

Sincerely and fraternally,

International Secretary-Treasurer

cc: Mr. C. L. Dennis, IP

JOSEPH L. RAUH, Jr.
JOHN SILARD
HARRIETT R. TAYLOR
RAUH, SILARD and LICHTMAN
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-1795

BODLE, FOGEL, JULBER, REINHARDT
and ROTHSCHILD
GEORGE E. BODLE
STEPHEN REINHARDT
LESTER G. OSTROV
JOEL N. KLEVENS
5900 Wilshire Boulevard, Suite 2600
Los Angeles, California 90036
(213) 937-6250

SOLOMON I. HIRSH
WILLIAM J. DONLON
6300 River Road
Rosemont, Illinois 60018
(312) 692-7711

JAMES L. HIGHSAW
HIGHSAW and MAHONEY
1015 18th Street, N.W., Suite 506
Washington, D.C. 20036
(202) 833-2020

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N AFFIDAVIT OF LESLIE E. DENNIS

ALLEN FAILS, et al.,
Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

STATE OF NEVADA)
) ss.:
COUNTY OF CLARK)

Leslie E. Dennis, being duly sworn, deposes and says:

1. I am the Director of Organization and Special Counsel to the International President of the Brotherhood of Railway and Airline Clerks. During the period 1967 to July of 1975, I was the Brotherhood's National Legislative Counsel, Director of Research and Education, Executive Director and an International Vice President. Prior to that time I was Assistant Executive Secretary to the Railway Labor Executives Association.

2. In my present positions, I have responsibility for all of the Brotherhood's organizing activities; all of its Manpower Training Programs with the Federal Government; and the activities of the Railway Clerk's Political League, particularly in Illinois. In addition, I play an active role in the Brotherhood's collective bargaining negotiations, and generally act in an administrative and advisory capacity to all of the different departments and offices of the Union.

3. My background and experience in all aspects of union affairs, and particularly in all aspects of the affairs of the Brotherhood, have given me an intimate and detailed understanding of the various functions and responsibilities of labor unions, and particularly of their collective bargaining, organizing, contract servicing, and grievance handling functions and responsibilities. This affidavit and the statements contained herein are based upon this understanding.

4. I have read the Memorandum of Points and Authorities in support of Plaintiffs' Motion for Summary Judgment and, for the reasons stated, have reached the following conclusions pertaining thereto:

a. Plaintiffs' statements (at p. 50) concerning the charges for "entertainment" on Jack Reese's expense accounts are in error, both factually and conceptually. The entire period covered by the Expense Account Statement to which plaintiffs refer was devoted to negotiations with Western Airlines (plaintiffs' employer), and every item on that statement resulted from such negotiations, grievance handling, or a combination of the two. The earlier statement on the same page that "purchases of liquor are routinely reimbursed to System Board officers . . ." is similarly in error, and for the same basic reason. Such purchases, as well as other expenses of Brotherhood employees, are only reimbursed by the Grand Lodge when they are incurred as appropriate and necessary business expenses. That policy is clear.

But we realize that business is not always conducted in an office. Thus, we reimburse for the expenses appropriate and necessary to a party given for workers after a union representation election. And we reimburse for the cost of a few beers in a bar while talking over negotiating or organizing problems. It's very rare for Brotherhood people to get together, even in a bar, without the conversation being totally involved in the Union, the activities of the Union and the programs you're working on. While social relationships develop -- at least in this Union -- I can think of very few meals that I've had with Union people where we weren't talking about the Union. The work relationship very often dominates to the point where it's a source of problems. When a meeting is held in a very nice spot where you'd like to bring your family, you can't, because the meeting just takes up all your time and involvement.

That's the kind of thing that Jack Reese submitted on his expense account; it should not be called "entertainment."

I have read Subsection III B 1(b) of Defendants' Memorandum attached hereto. The statements made therein relating to negotiations and to entertainment are true.

b. Plaintiffs' statements (at pp. 60-61) concerning organizing expenses are replete with errors. The idea that organizing first and foremost has a financial base is not true in terms of any immediate results of organizing. Generally, the reason you are organizing new people is

because they are making very low wages and have very poor working conditions. You can't possibly charge them the same rates of dues as you charge people who have established contracts and established working conditions. So employees at newly organized locations are charged dues at a rate that is much closer to the realities of their work situation, and we probably don't make money on them. We are charging dues which barely meet our costs and may not even meet our costs in many ways.

Our belief is that there must be a relationship between the dues and the conditions of the people being represented, and the people who are better off relatively have some moral obligation to the people who are not so well off.

Moreover, plaintiffs misconstrue virtually every Brotherhood organizing effort about which they complain. For example, they make much of our organization of casino dealers in Las Vegas, citing it as an example of Brotherhood organizing which is completely unrelated to Western Airlines. But even aside from their mistaken assumption that such efforts account for a major part of our organizing expenses, they are simply wrong about the relation between Western and the casino dealers. The fact is that the organizing in Las Vegas is very related to Western. One only has to travel up and down the expressways in the Los Angeles area to understand the relationship between Western Airlines and everything that happens in Nevada. The fact is that much of the activity of the airline is involved in flying people back and forth between these two areas, and that there are a lot of multi-employer relationships there. For example, there's a great deal of tour booking between Western Airlines and the hotels in which the casino dealers operate. Thus, there is a great deal of contact there. It's for that reason, really, that the casino employees of Las Vegas contacted the Western Airlines System Board. They did not contact the Grand Lodge. They contacted the personnel of the Western Airlines System Board because they *knew* those people, because those people are so involved with the whole touring-travel industry which is the life's blood of the cities of Las Vegas, Reno and Lake Tahoe. So there's a lot of contact and a very close relation between the organizing in Las Vegas and Western Airlines.

Similarly, plaintiffs' complaint about our organizing of "some employees of Marriott," which they say is "presumably a hotel," is way off base. We don't have a Marriott hotel organized. What we have organized, and what we've primarily concentrated on, are Marriott's in-flight services operations which are obviously very closely related to

Western Airlines. In fact, in-flight services originally were all performed by the airlines. Then the work was contracted out from the airlines to various outfits like Marriott, which is a notoriously anti-union employer. We've tried very hard to organize the people in that area -- to bring their wages up to conditions that are comparable to other airline people. That would stop the erosion of work. So we think we have a very strong, direct interest in trying to organize Marriott. And the members on airlines have a very strong, direct interest, also. For example, Northwest Airlines recently took its in-flight services in Anchorage away from its employees and gave them to Harvey's. So it's very important, we feel, to force these substandard employers to pay their people decent wages.

Plaintiffs' reference (Appendix at p. 100) to an NLRB election on July 17 with Marriott had to be one of our attempts at organizing the in-flight services of Marriott, because we've never filed on a Marriott hotel. We'd like to -- we think they ought to be organized. But we've concentrated on Marriott's airport services.

I have read Subsection III B 1(g) of Defendants' Memorandum attached hereto. The statements made therein are true.

5. Finally, I wish to correct plaintiffs' serious misconception about the Brotherhood's Department of Organization in general, and its organizing expenses in particular. The Department of Organization is ordinarily thought of as the arm of a union which is exclusively engaged in expanding the union into new areas by organizing workers in companies which have been previously unorganized. That, I suppose, is the classic definition of the term. However, that is a completely misleading statement when it is applied to BRAC. Largely as a result of our long history, we developed our own *modus operandi*, rather than fitting into the usual industrial union mold.

An examination of our Constitution would lead one to believe that each local lodge, system board, district council, and other subordinate body is heavily engaged in organizing new companies. This is simply not the case. The organizing committees described in the Constitution were established for the purpose of soliciting membership in companies where the Union already had representation. When the union shop agreement was reached in the railroad industry, such local and system committees simply ceased to function.

Today, I know of no lodges in the railroad or airline industry which

have a functioning organizing committee. Most do not even bother to appoint one. The organizing activities of system boards and local lodges are also virtually nonexistent. There *are* some exceptions, but they are few. Western Airlines System Board is one of the exceptions. They have attempted to organize a number of airline and travel related companies, including sky cap contractors, Las Vegas casino employes, airport food services personnel (Marriott), and other airlines. As a percentage of their total budget, these activities would be very slight, since the Grand Lodge reimburses them for any heavy expenses involved. The other major exception is the Allied Services Division System Board, which is a relatively new group primarily composed of newly organized properties.

The members of the Grand Lodge Department of Organization, then, are the people who are primarily charged with BRAC's organizing efforts. However, such efforts have always taken second place to any immediate needs for increased service, or for defense against raids from other unions. Of the Department of Organization's present staff of 21 people, 2 are secretaries who devote over half their time to handling correspondence dealing with negotiations and grievance handling on the Allied Services Division property; 2 are administrators who devote at least one-half their time assisting the administrative department of the Brotherhood; 6 are Grand Lodge Representatives who spend over 90% of their time handling grievances and policing contracts on existing properties; 2 spend approximately half their time carrying out educational programs among existing Union members; and the remaining eight spend approximately 40% of their time in the service area and sixty percent of their time in direct organizing. Such estimates, of course, vary from time to time. However, the "variance" has almost uniformly been in the direction of more servicing work and less organizing work. Thus, one of the principal functions of the Department has been to serve as the trouble shooting arm of the International President. When new officers are elected on a system board; or when there are problems on the Board handling a grievance backlog; or when a strike is called; or when extra negotiating help is needed, people from the Department of Organization are usually assigned to assist. For that reason, we have had as many as eight or ten people assigned to Western Airlines during particularly difficult periods; as many as 10 or 12 assigned to Northwest Airlines during a strike. It is no accident that two of the four past General Chairmen of the Western Airlines System Board were former organizers. They had served as the Grand Lodge staff assigned to assist the members in handling grievances and negotiating contracts.

In addition, of course, we have the actual matter of organizing new members on new properties. We are, very frankly, attempting to increase this activity. We believe it is in the interests of those we represent to expand the Union's base. If we were exclusively an airline clerical union, for example, we could not have survived the Northwest Airlines strike.

The employers in transportation, whether airline or rail, have multi-employer associations which develop uniform labor relations positions. In the airline industry, they have even formed a Mutual Air Pact which is designed to break a union that strikes. If the unions do not organize the unorganized workers in the airlines industry, there is no way they can defend themselves against this type of employer collusion.

Most unions today have recognized that they need to expand their base beyond a single craft/single industry concept. Such expansion is the only way that they can provide those they represent with institutional stability which can ride out crises in a particular set of negotiations in a particular craft or industry. While the crisis is met in one set of negotiations, members in other crafts or industries sustain the efforts of those facing the crisis. Very frankly, this solidarity of a broadened base keeps dues down and provides all of the members with a healthy institutional base.

BRAC's goal is to expand our base. Our resources, however, are quite limited, and our policy is that such expansion must always play second fiddle to the servicing of our existing contracts.

Leslie E. Dennis
LESLIE E. DENNIS

STATE OF NEVADA)
COUNTY OF CLARK) ss.:

Sworn to and subscribed before me this 13TH day of November, 1975.

Eddie La Rue
Notary Public

My Commission expires: MAR 15, 1977

NOTARY PUBLIC - STATE OF NEVADA
CLARK COUNTY
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N AFFIDAVIT OF LLOYD ULMAN IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I, Lloyd Ulman, being first duly sworn, do hereby depose and say:

1. I am currently a Professor of Economics at the University of California at Berkeley, and I also serve as the Director of the Institute of Industrial Relations at the University. My tenure at the University of California as a Professor of Economics commenced in 1958, and I have served as the Director of the Institute of Industrial Relations since 1963. Prior to 1958, I held the position of Professor of Economics and Industrial Relations at the University of Minnesota, and I was a visiting lecturer in Economics at Harvard University. In 1966-1967, I was a Guggenheim Foundation Fellow and Visiting Member at the London School of Economics, and in 1973-1974 I was a Visiting Fellow at All Souls College, Oxford University. I am a member of the American Economic Association, the Industrial Relations Research Association, and Phi Beta Kappa.

2. As a labor economist, I have extensive education and training in the fields of industrial relations, labor economics, and labor history; and I have written extensively on those subjects. I have served as a consultant to the Council of Economic Advisors and the Federal Reserve Board, and I have served as a member of the Advisory Panel to the President's Review Committee on Federal Employee-Management Relations, the National Manpower Policy Task Force, and the National Manpower Advisory Committee. I am currently serving as a member of the Panel of Economic Consultants to the Secretary of the Treasury. A full and complete summary of relevant biographical and bibliographical material pertaining to my qualifications is attached hereto as Exhibit "A".

3. My background, education, and experience have given me an intimate and detailed understanding of the process of collective bargaining engaged in by labor unions and of the historical and economic components of that process. This affidavit and the opinions contained within it are based upon my education, training, and experience as a labor economist and, if called upon to testify, I could testify competently to the opinions stated herein.

4. I have reviewed pages 20 through 63 of the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, and I have analyzed plaintiffs' conclusions regarding the nature of collective bargaining and the expenditures of dues moneys which may be categorized as falling within the scope of collective bargaining. I am also generally familiar with the size and structure of defendant BRAC.

5. My conclusion is that plaintiffs are in error when they state that "the concept of collective bargaining delimits the scope of costs chargeable to the plaintiffs to those incurred by BRAC in dealing with Western Airlines with regard to the working conditions of plaintiffs' bargaining unit." That narrow definition of collective bargaining, which limits the costs of "collective bargaining" for plaintiffs to expenditures directed solely to the working conditions within the plaintiffs' bargaining unit, is inconsistent with both the history and the economic realities underlying collective bargaining. Moreover, plaintiffs' contention that expenditures for unions' "institutional activities," including expenditures for publications, conventions, strike benefits, organization, and litigation are beyond the scope of collective bargaining expenditures by unions is likewise without foundation in either the history or the economic realities of collective bargaining. The reasons for my conclusions are stated below.

6. The contention that the scope of collective bargaining expenditures which plaintiffs' dues can be used to support can be limited to those incurred by BRAC in dealing with Western Airlines with regard to the working conditions within the plaintiffs' bargaining unit essentially implies that the finances of unions must be limited to purely local negotiating functions. I disagree with this argument because it is in conflict with the economic realities that produced national and industrial unions in this country.

The American trade union movement is distinguished from the

movements in other countries by the degree to which it pursues the objectives of economic security and advancement and equity on the job by the method of collective bargaining. Other union movements have relied more heavily upon legislative enactment of conditions of employment, upon mutual insurance, or upon radical political activity. This reliance upon collective bargaining as the primary means has made the economic environment of American trade unions a critical determinant of their growth and structures. To the extent that the bargaining strength of the employing unit is affected by forces coming from outside that unit, a bargaining-oriented union will seek to create or maintain institutions which are sufficiently wide or centralized to enable the union either to neutralize such forces or to exploit them for its own advantage. Accordingly, local unions have formed and joined national unions, national unions have amalgamated or formed "coalitions" for collective bargaining, and unions have striven for company-wide or even multi-employer bargaining structures.

Historically, American trade unions have expanded geographically as the scope of the market area in which they operate has expanded. As labor markets and product markets have expanded and as the size of enterprises has grown, labor unions have also grown in order to be able to deal effectively with employers in a collective bargaining context. For example, looking at labor markets, as the mobility of labor in particular occupations has increased, labor unions have had to coordinate strategies of bargaining for labor conditions and wages in order to rationalize the competition between members of the labor force. If the wages in one segment of the labor market are lower than in another, that will affect the ability of other segments to bargain effectively for higher wages. Therefore, the historic tendency has been for local unions to join together into larger regional and national units so that their span of orgarganizational [*sic*] control would correspond more closely with the size of the labor market within the relevant industry.

Similarly, as product markets have expanded due to economic changes and the area of competition among employers has expanded, the level of interdependence of employees of those employers has concomitantly increased. The ability of one employer within a product market to pay his employees depends upon his profitability, and his profitability depends upon the competition from other employers; and the profitability of other employers is affected by their labor costs. Therefore, what employees of one employer within a product market are paid will depend in part upon what other employees of other employers within the market

are paid. Thus, again, local labor unions have banded together to encompass the relevant product market.

An illustrative early example of this interdependence is provided by a historian of the Iron Molders' Union:

> "A few of the locals had been able during the depression of 1861 to prevent any reduction in their wages; but on account of the disorganized condition of the trade in other cities, even these few were unable to enforce their demands for wages commensurate with the rising cost of living." (H.E. Hoagland, "The Rise of the Iron Molders' International Union," *American Economic Review*, June 1913, at page 310.)

Similarly, the preamble of the "National Federation of Miners' and Mine Laborers of the United States and Territories" recognized in 1885 the effect which an expanding product market had had upon coal miners:

> "As miners and mine laborers our troubles are everywhere of a similar character. The inexorable law of supply and demand determine the point where our interests unite. The increased shipping facilities of the last few years have made all coal-producing districts competitors in the markets of this country. This has led to indiscriminate cutting of market prices and unnecessary reductions in our wages, which for some time have been far below a living rate. . . . Local, district and State organizations have done much toward ameliorating the condition of our craft in the past, but today neither district nor State unions can regulate the market to which their coal is shipped. We know this to our sorrow. . . . In a federation of all lodges and branches of miners' unions lies our only hope." (Reproduced in Chris Evans, *History of the United Mine Workers of America* (1918), vol. I, at pages 139, 145.)

In more recent times, especially since World War II, business conditions have fortunately been good enough to prevent widespread cutting of money wages. Yet, in many industries, unions, and frequently companies as well, perceive the need to bargain on a centralized basis in order to present a united front to the other side during negotiations and strikes. But even when the need for industry-wide or regional bargaining is not felt, the union side (or the management side) might still be able to gain a bargaining advantage by coordinating piecemeal negotiations through an

organizational unit which is broader in scope than the one used by the other side.

Furthermore, the realities of power have necessitated the growth of labor unions beyond individual bargaining units, as the enterprises with which they bargain have grown. A single-unit labor union generally cannot bargain effectively with a multi-unit employer whose economic power dwarfs that of the union. Therefore, labor unions have broadened their base of financial support, their membership, and their decision-making in order to equalize their bargaining power with that of enlarged employers.

The process of amalgamation of local unions into larger units has also been necessitated by technological changes or changes in consumer tastes which have had the effect of creating new industries. For example, the invention of the metal door gave rise to a famous jurisdictional dispute between the sheet metal workers and the carpenters because the technological advancement created a new industry overlapping the jurisdictional bounds of the two unions. Such changes have often resulted in the merger or coalition of competing unions to be able to encompass the new industry; or competing unions have engaged in competition until one of the unions expanded at the expense of the other.

It matters not whether the interests of groups of employees are competitive or complementary. The critical fact is that economic forces have dictated that the interests of local bargaining units have become interdependent. The wages, working conditions, and bargaining strategies of one local unit inherently affect those of other units within the same labor market, product market or enterprise. And this interdependence has necessitated the rise of industrial uninos, national unions, and the development of bargaining alliances and less formal cooperative bargaining techniques.

Applying the foregoing analysis to the airline industry, the same economic factors, mediated through the mechanism of rate setting, have produced unions which encompass more than one bargaining unit. Airline rates are regulated at least in part on the basis of the profitability of the entire industry. Therefore, the ability of one airline to pay wages to a particular bargaining unit depends upon the profitability of that airline, and that profitability depends upon the rates it can charge. However, those rates are affected by the profitability of other airlines, and their profitability depends, at least in part, on their labor costs.

Therefore, the economic interests of the employees in the various bargaining units of one airline and in the bargaining units of other airlines are interdependent, and there is the necessity for unions representing individual units to join together to coordinate bargaining strategies and bargaining goals.

The economic interdependence between airlines is manifested in the Mutual Aid Pact. In times of strikes, airlines which are able to fly pay struck airlines on the theory that they are compensating them for the traffic which the non-striking airlines derive by taking over business from the struck airlines. And, the fact that a striking union encounters the economic power of several airlines necessitates the growth of unions encompassing several airlines.

Moreover, this economic interdependence extends beyond the airline industry proper into the overall transportation industry because competitive relationships in the product market necessitate interdependence in the labor market and bargaining. For example, as Amtrak fast trains increasingly compete with airlines' passenger service--perhaps under the impetus of a national energy policy--the wages and working conditions on the trains become a matter of greater economic concern to the unions representing the airline employees. If wages on the trains lag substantially behind those on the airlines and the trains acquire a competitive advantage over airlines and take substantial business from them, the ability of airlines' employees to successfully demand higher wages is affected. Similarly, any elements of competition between industries which a union's employer worries about ultimately become a source of concern to the union, and frequently the concern generates a desire to increase cooperation between the unions involved, so that a greater degree of control can be exercised over the economic factors affecting bargaining.

If the law were such that unions could collect and expend dues money solely within individual bargaining units, the effect would be to restrict their span of decision making and power so that that span was narrower than the relevant market area. In that instance, competitive forces could work decisively to restrain and decrease union power. If there is any justification for the plaintiffs contention that unions should be so restricted, it is that union power should be reduced absolutely and vis-a-vis the employers with whom they bargain. Certainly, the concept of collective bargaining, properly understood, does not imply the reduction in union power and control which plaintiffs' position would effect. Indeed, as hereinabove discussed, it has been the reality of collective bargaining

in expanded product and labor markets which has produced the growth of unions which plaintiffs now seek to reverse.

7. Plaintiffs' contention that the "institutional" expenditures of unions can and should be separated from those which are related to collective bargaining is likewise without merit. Numerous activities, which appear to be "internal" to the organization and therefore remote from collective bargaining, powerfully affect the outcome of collective bargaining. Obvious examples of such activities are elections, conventions, and publications.

a. National unions tend to be large, pluralistic organizations in which substantive differences in economic priorities have to be hammered out among the members. Much of a union's institutionalism is necessitated by the process of arriving at a consensus on these economic priorities as a precondition of bargaining with employers. Some of the most difficult and time-consuming aspects of collective bargaining involve the reconciliation of different, often conflicting, views on economic priorities at various local levels of the union so that a bargaining strategy can be determined. The institutional ways of achieving this consensus include union elections, executive boards, journals, and conventions. Union elections and conventions provide a means for arriving at a consensus on all of the myriad issues which affect local and national bargaining strategies, and union journals provide a means of communication within the union both before and after consensus is reached. Therefore, expenditures on conventions, elections, and union publications are essential to the process of collective bargaining in a large labor union.

b. It is even easier to justify expenditures on strike benefits within the scope of collective bargaining. Bargaining implies the right to strike, and the effectiveness of a strike is directly related to the ability of the labor union and its members to remain on strike long enough to induce meaningful bargaining concessions from the employer. This ability is enhanced by a strike fund to support the members during the period of the strike, and the larger the fund the longer the members can remain on strike.

The strike fund of a national union is more effective than that of a local union because it can be concentrated in one particular year or against one particular employer in order to produce important strategic bargaining advantages. For example, if a national strike fund is

concentrated against a particular employer who is in a competitive relationship with other employers, the union will likely be able to prevail in its strike against that employer; and that success may have a "ripple" effect throughout the entire industry. Thus, the concentrated use of a national strike fund by one local union in its strike could be more effective than a strike by each local restricted to a proportional share of the national strike fund.

If plaintiffs are successful and a strike fund, if it can be collected from dues payments at all, must be restricted to the dues payments of a particular bargaining unit, the effect will be substantially to reduce the bargaining power on the union side. Employers, like Western Airlines, will know that neither the national union nor its locals have a central strike fund which can be concentrated, and that knowledge will affect every aspect of the bargaining relationship between BRAC and Western Airlines.

c. Dues expenditures on organization also play a central role in the collective bargaining process. This relationship is most obvious in situations where a union is seeking to organize unorganized elements within its relevant market area. If some employers within the relevant market are unorganized, they may pay substantially lower wages, be subject to fewer restrictions on the use of labor, and have substantially lower labor costs. That competitive advantage could well result in a loss of business or markets by the organized employers. Such a loss would inevitably be reflected at the bargaining table in reduced ability to pay wages and other benefits.

Organization is also a means of maintaining the size and the strength of national unions. Because the size of a union's membership and the financial resources in its strike fund affect the bargaining power of the union, organizational efforts aimed at expanding the size and financial strength of the union bear a direct relationship to bargaining strength. Furthermore, in the context of the instant lawsuit, it must be recognized that such organizational efforts will not impose any net cost to the union in dues money or other resources if the costs are ultimately offset by the increased dues that the newly-organized units provide to the union.

The relationship between bargaining strength and organization can be seen most clearly in the case of organizational efforts within a single industry. Taking the airline industry as an example, the airlines

have banded together to form a mutual aid pact to assist one another during strikes. If a union's organization did not extend beyond a single airline, or as plaintiffs would have it, beyond a single bargaining unit, its ability to strike any single employer would be marginal because that employer, with the aid of the others, could always withstand any strike that the smaller union could sustain. The union would need the ability to strike along a broad front supported by a massive strike fund in order to compete effectively with the combined strength of the airlines. Therefore, only an effective organizational program can provide a union with the membership and the financial strength necessary to bargain successfully against national employers who have pooled their resources.

d. Recreational expenditures by unions, of course, bear a much less direct relationship to collective bargaining. Nevertheless, the institutional strength of a labor union does depend on its morale and the degree to which its members are satisfied and feel a part of the organization. Recreational expenditures, such as refreshments at union meetings and social gatherings of union members and their families, might well contribute to the morale of a labor organization, and this morale might prove important in some future strike or organizational campaign.

In general, union expenditures on recreation are not unlike those of other large organizations. Large organizations can afford to expend sums on recreation and generally believe those expenditures bear fruit in the smooth functioning of the organization. The same is true of large labor unions. Of course, such expenditures can be abused if carried to excess, but the possibility of abuse does not justify a prohibition on the use of dues money for legitimate recreational activities.

e. Union death benefit funds are a product of the history of the American labor movement and have their roots in that history. Early in the labor movement, prior to the development of a legal environment conducive to collective bargaining when unions were not free to engage in collective bargaining, they operated primarily as mutual insurance societies. By joining together and contributing to a common insurance fund, workers were able to gain a measure of security against layoffs, deaths, and other catastrophics beyond their control. Union death benefit funds developed out of this mutual insurance concept. Later, death benefit funds also came to be viewed as a benefit which unions could offer to prospective members and therefore as an aid to organizational efforts.

With the enactment of social security and laws authorizing dues

checkoff and, most important, the development of a secure position for labor unions as collective bargaining agents, the necessity for death benefit funds as a protective device and as a bargaining aid declined. Nevertheless, death benefit funds do provide a desirable economic benefit to union members and, therefore, they do serve as an organizational aid and as a means of strengthening the union internally.

f. Finally, litigation expenses would seem to constitute an obvious and direct collective bargaining expenditure. Taking the instant lawsuit as an example, expenditures to defend against it are aimed directly at opposing an effort to fragment and weaken the union as a bargaining agent. To the extent that the lawsuit is successful in restricting the financial base of the union to expenditures for members on a unit-by-unit basis, the bargaining strength of the union in the airline and transportation industries will be correspondingly fragmented and weakened to the detriment of the union and its members. Therefore, expenditures to defend the lawsuit must be viewed as legitimate institutional and collective bargaining expenditures.

In the same way in which corporations can justify expenditures to defend against antitrust suits, labor unions can justify expenditures to defend lawsuits aimed at weakening them. The instant lawsuit provides the clearest example, although other litigation might pose a financial threat to the union which, if successful, might impair bargaining strength. For a labor union to further its objective of economic enhancement of its members through bargaining, it must defend itself against attacks in the courts which, if successful, would weaken the union financially, organizationally, or directly at the bargaining table.

To summarize my position, the union activities described above in paragraphs 6 and 7, which are supported financially by the local components of national unions such as those in the BRAC, do serve substantially to determine the bargaining strength and efficiency of those component organizations in their relations with their members' own employers. Indeed, national unions have acquired and developed their main functions and authority in response to the bargaining requirements of local units. The activities and functioning of national unions are not neutral with respect to the bargaining efficiency of local organizations, as plaintiffs assert and as they erroneously appear to infer from the industrial relations literature which they cite. On the contrary, to limit expenditures of component unions to those which directly finance meetings with the employers of their own members would severely impair their

bargaining strength and efficiency.

LLOYD ULMAN

Subscribed and sworn to before me
this 13th day of November, 1975.

Notary Public in and for Said
County and State

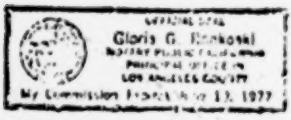

EXHIBIT "A"

LLOYD ULMAN

Basic Biographical Data

Date of Birth: April 22, 1920

Education and Degrees:

A.B. - Columbia College, 1940
A.M. - University of Wisconsin, 1941
Ph.D. - Harvard University, 1950

Military Service: U.S. Navy, 1942-1946

Positions Held

1950-1952: Assistant Professor, Economics and Industrial Relations, University of Minnesota
1952-1956: Associate Professor, Economics and Industrial Relations, University of Minnesota
1956-1958: Professor, Economics and Industrial Relations, University of Minnesota
1957-1958: Visiting Lecturer in Economics, Harvard University
1958- : Professor, Department of Economics, University of California, Berkeley
1961-1962: Senior Labor Economist, Council of Economic Advisers, Washington, D.C.
1963- : Director, Institute of Industrial Relations, University of California, Berkeley
1966-1967: Guggenheim Foundation Fellow and Visiting Member, London School of Economics
1973-1974: Visiting Fellow, All Souls College, Oxford University

Publications

Books and Monographs:

**The Rise of the National Trade Union* (Cambridge, Mass.: Harvard University Press, 1955), 639 pp. (Second Edition, 1966.)

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Book Reviews:

American Labor Unions and Politics, 1900-1918 by Marc Karson. *Labor History*, Vol. 1, No. 1, Winter 1959, pp. 81-84.

Trade Unions in a Free Society by B. C. Roberts. *Economics*, May 1963.

Trade Union Growth, Structure and Policy by H. A. Turner. *Political Science Quarterly*, Vol. LXXIX, No. 1, March 1964, pp. 126-129.

Professional Activities

Membership in Societies:

American Economic Association
Industrial Relations Research Association
Phi Beta Kappa

Miscellaneous Professional Appointments and Activities:

1962, Member, U. S. Delegation to OECD Manpower and Social Affairs Committee, Paris, June 1962.

January 1963, member of Presidential Board of Inquiry under Section 206 of the Labor-Management Relations Act, concerning the dispute between the Boeing Company and the International Association of Machinists.

April 1963, U. S. Member of International Working Party of economists (under OECD) to consider problems of Wage Structures and Labour Mobility.

July 1963 - December 1968, Consultant, Council of Economic Advisers.

June 1964 - June 1965, member, Panel of Consultants to Research Committee of California Commission on Manpower, Automation, and Technology.

February 1966, Consultant to Federal Reserve Board, Washington, D. C.

March 1966, awarded Guggenheim Foundation Grant for academic year 1966-67. (Resigned SSRC Faculty Research Grant dated December 14, 1965.)

August 1967, member of the San Francisco Economic Development Committee.

October 1967, Member of 5-man advisory panel to the President's Review Committee on Federal Employee-Management Relations.

November 1967 - November 1970, Member of the Executive Board of the Industrial Relations Research Association.

1968 - 1973, Member of the Technical Advisory Committee to the Carnegie Commission on Higher Education.

June - July 1968, Member of OAS Mission on Labor Studies in Latin American Universities (Pan American Union).

1969 - 1971, Member of the Editorial Board of the *American Economic Review*.

July 1969, Member of the National Manpower Policy Task Force.

June 1970, Member of the National Manpower Advisory Committee.

September 1971, Member of the OECD Steering Group on Wage Determination.

1975, Member, Panel of Economic Consultants to the Secretary of the Treasury.

Public Lectures or Forums and Miscellaneous Appointments

Led seminar discussion on inflation, R. Rashen's group of executives, February 1959.

"Union Democracy and Wage Inflation," University Extension Program, Sonoma Mission Inn, February 12-13, 1959.

Participated in Round Table Panel on Unemployment, KPFA, May 6, 1959.

Moderator of address by J. R. Hoffa on campus on the subject, "The Affluent Society and the Alcatraz Set," May 20, 1959.

Testified before Joint Economic Committee, *Hearings on Employment, Growth and Price Levels*, Part 8, pp. 2556-2568, September 29, 1959.

Addressed and participated in union symposium, Labor and the Free Society, Santa Rosa, December 4-6, 1959.

"Is Industrial Warfare Inevitable?" Oakland Town Hall, January 11, 1960.

"The Economic Boundaries of Collective Bargaining," Labor Relations Conference, Sandia Corporation, Albuquerque, New Mexico, February 18, 1960.

"Market Power of Trade Unions," Faculty Seminar, Michigan State University, April 1960.

Participated in panel discussion on problems of the economy, KTVU, October 1960.

Participated in panel discussion on West Coast Longshore agreement on automation and work rules, KQED, "Profile Bay Area," December 1, 1960.

Public lecture on "Industrial Relations Problems and the Kennedy Administration," April 6, 1961.

Public lecture on "Strikes and Labor Management Policies," Business Administration Extension, June 8, 1961.

Radio program with Hon. Jeffery H. Cohelan, August 1962.

Participant in National Conference on Economic Policy, Washington, D. C., November 14-15, 1962.

Speaker at Union Symposium, Labor and the Free Society, Santa Rosa, December 8, 1962.

Presented paper on "Labor Policy of the Kennedy Administration" at Annual Meeting of the Industrial Relations Research Association, Pittsburgh, Pa., December 26, 1962.

Addressed meeting of the Commonwealth Club, San Francisco, on their economic report concerning the American economy's competitiveness with the USSR, January 17, 1963.

Participant in University-sponsored conference on The Metropolitan Future on Berkeley campus, September 27, 1963.

Speaker at Bureau of Employment Security Conference, Berkeley, on "Wage Structure and Labor Mobility in the U. S.," December 12, 1963.

Speaker at Labor and the Free Society conference, Santa Rosa, on "Tax Cuts and Unemployment," December 13-15, 1963.

Participant in panel on "How Does a Mixed Economy Function?" for the "Money in Motion" series on KRON-TV, San Francisco, February 16, 1964.

Participant in panel of the 9th Annual Business Administration Alumni Association Conference, San Francisco, April 24, 1964.

Workshop Chairman, Conference on Automation, sponsored by President's Labor-Management Advisory Committee, UCLA, June 4, 1964.

Dinner Chairman, Consumer Economics Conference, Berkeley, September 10, 1964.

Addressed Personnel Administration Seminar on the Automobile Settlement, October 14, 1964.

Discussant at Annual Meeting of the Industrial Relations Research Association, Chicago, December 28-30, 1964.

General Chairman, Conference on Poverty in America, Berkeley, February 27-28, 1965.

Participant in East Bay Civil Rights Conference, sponsored by Campus CORE, Berkeley, July 17, 1965.

General Chairman and Discussion Group Chairman, Governor's Conference on Employment, Monterey, Calif., September 30 - October 3, 1965.

Prepared paper on "Automation in Economic Perspective" for Voice of America Series on The Changing Economy, for radio broadcast and later publication. (Broadcast taped January 14, 1966.)

Prepared paper on "What is a Practicable Unemployment Goal for 1966?" for Federal Reserve Board. Delivered paper at conference of Consultants called by the Board in Washington, D. C., March 3, 1966.

Addressed seminar at New York School of Labor and Industrial Relations, Cornell University, Ithaca, March 4, 1966.

Participated in conference on Guidelines, Informal Controls, and the Market Place, sponsored by the University of Chicago School of Business, Chicago, April 27-29, 1966.

Speaker at and General Chairman of the Annual Industrial Relations Conference, San Francisco, May 17, 1966.

Participated in conference on Manpower Policy, sponsored by the Ford Unemployment Grant, New York, June 20-22, 1966.

Speaker in Executive Education Program, School of Business Administration, Berkeley, June 29, 1966.

Organizer and Chairman, American Assembly Conference on "Challenges to Collective Bargaining," Arden House, New York, October 27-30, 1966.

Participant in two conferences on The Labour Market and Inflation in Geneva, Switzerland, while on Guggenheim Fellowship, October 24-25, 1966, and June 12-13, 1967.

Public Lectures given while on Guggenheim Foundation Fellowship, 1966-67:

University of Sussex, Brighton, December 8, 1966.
University of Amsterdam, February 1, 1967.
University of Warwick, March 4, 1967.
University of Glasgow at St. Andrews, April 6, 1967.
London School of Economics, May 9, 1967.
Institutet for Arbetsmarknadsfragor, University of Stockholm, June 6, 1967.
British Institute of Management, London, June 21, 1967.

Participant in Conference on Incomes Policy, Ulricehamn, Sweden, August 17-18, 1967.

Participant in conference on the economy of the U. K. at the Brookings Institution, Washington, D. C., November 9-10, 1967.

Discussant of meeting of consultants to the Federal Reserve Board, November 28, 1967.

Speaker at Western Conference of Teamsters meeting, Phoenix, Ariz., January 22-24, 1968.

Discussant at National Academy of Arbitrators Conference, Cleveland, Ohio, February 1, 1968.

Addressed Industrial Relations group at Kaiser Industries, March 6, 1968.

Chairman and speaker at Conference on Collective Negotiations with Non-Certificated Personnel, sponsored by IIR, San Francisco, May 14, 1968.

Chairman and speaker at IIR Annual Conference on The Changing Environment of Collective Bargaining, San Francisco, May 28, 1968.

Chairman, IIR Annual Conference on "Industrial Relations and the Urban Crisis," San Francisco, May 28, 1969.

Appointed member of the Academic Senate Special Committee to Study the Recommendations of the California Constitution Revision Commission that Relate to Article IX of the State Constitution, 1969.

Appointed member of the Special Advisory Committee to the Chancellor on the chairmanship of the Ethnic Studies Department, 1969.

General Chairman, IIR and School of Business Administration conference on "The Minority Community and the Economic Mainstream," San Francisco, June 19, 1969.

Appointed member of the Academic Senate Committee on Senate Policy, August 1, 1969. Served as Chairman of the Committee for 1970-71.

Chairman, Annual Industrial Relations Conference on "Rising Expectations and Lagging Opportunities: Critical Issues in Industrial Relations," San Francisco, May 27, 1970.

Chairman, Conference on the Interrelationships Between Manpower Policy and Macro-economic Policy, sponsored by the National Manpower Policy Task Force, March 19, 1971.

Presented paper on "Inflation Policies and Collective Bargaining" at The Third Annual Collective Bargaining Forum, Automation House, New York City, May 24-26, 1971.

Addressed Section on Business Economics, Commonwealth Club of California, on "Cost-Push Inflation and Policy Prescriptions," August 10, 1971.

Testified before the Joint Economic Committee on the Wage-Price Freeze, Washington, D. C., September 14, 1971.

Addressed Alumni Association of the U.C. School of Business Administration on wage and price control, San Francisco, October 12, 1971.

Chairman, Conference on "Phase I to Phase II: The New Economic Policy in Transition," sponsored by the Institute of Industrial Relations, San Francisco, November 23, 1971.

Presented paper on "Cost-Push and Some Policy Alternatives" at a joint session of the Industrial Relations Research Association and the American Economic Association annual meetings in New Orleans, December 27-30, 1971.

Appointed Chairman of Senate Policy Subcommittee on Possible Faculty Collective Action, January 1972.

Presented paper on "Phase II in Context: Towards an Incomes Policy for Conservatives" at Pierce Memorial Lectures, N. Y. State School of Industrial and Labor Relations, Cornell University, April 20, 1972.

Participated in the California Department of Finance Economic Outlook Conference, April 25, 1972.

Appointed member of Interim Executive Board of the Faculty Association, July 1972.

Chairman, Conference on Manpower sponsored by U.C. Extension and School of Environmental Design, U.C. campus, August 3, 1972.

Participated in NSF Summer Urban Economics Institute, Stanford University, August 14, 1972.

Chairman, conference on Labor Arbitration, sponsored by Institute of Industrial Relations, San Francisco, October 18, 1973.

Chairman, conference on Jobs and the Environment: Who's Jobs, Who's Environment? sponsored by Institute of Industrial Relations, San Francisco, November 28, 1973.

Presented paper on "The Rise of the International Union?" at conference on Industrial Relations and the Multinational Corporation, sponsored by Graduate School of Busienss, University of Chicago, at Johnson Foundation, Racine, Wisconsin, April 30 - May 2, 1973.

Chairman, Symposium on Revision of California's Public Employee Bargaining Laws, sponsored by Institute of Industrial Relations, San Francisco, May 24-25, 1973.

Luncheon Chairman, conference on "Is The Strike Outmoded?" sponsored by Institute of Collective Bargaining and Group Relations, Inc., Fifth Annual Collective Bargaining Forum, San Francisco, June 7-8, 1973.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, being first duly sworn, depose and say:

I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that my business address is 5900 Wilshire Boulevard, Suite 2600, Los Angeles, California 90036.

On November 17, 1975, I served the within AFFIDAVIT OF LLOYD ULMAN IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT on the plaintiffs in said action, by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at 5900 Wilshire Boulevard, Los Angeles, California 90036, addressed as follows:

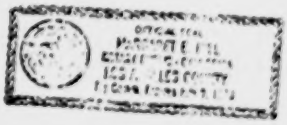
Michael E. Merrill, Esq.
Raymond J. LaJeunesse, Jr., Esq.
The National Right to Work Legal
Defense Foundation, Inc.
8316 Arlington Boulevard, Suite 600
Fairfax, Virginia 22030

Jonathan C. Gibson, Esq.
Gibson & Kennerson
1212 Home Tower
707 Broadway
San Diego, California 92101

John L. Kilcullen, Esq.
Webster & Kilcullen
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Gloria Renkowski
Gloria Renkowski

Subscribed and sworn to before me
this 17th day of November, 1975.



Notary Public in and for Said
County and State

signature

Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1150

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX — VOLUME III

MICHAEL E. MERRILL
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PETITION FOR CERTIORARI FILED JANUARY 7, 1983.
CERTIORARI GRANTED APRIL 18, 1983.

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DEFENDANTS' TRIAL EXHIBIT CS JA-454

DEFENDANTS' TRIAL EXHIBIT CV JA-456

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JOHN SILARD
HARRIETT R. TAYLOR
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Washington, D.C. 20036
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FILED

JAN 9 1976

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

BODLE, FOGEL, JULBER, REINHARDT
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Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,
Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

CIVIL NO. 73-113-N

Consolidated with

CIVIL NO. 73-118-N

AFFIDAVIT OF WILLARD WIRTZ

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

COUNTY OF MONTGOMERY)
STATE OF MARYLAND) SS.:

WILLARD WIRTZ, being duly sworn, deposes and states as follows:

1. I am a resident of the District of Columbia. It is relevant here that between 1962 and 1969 I served as Secretary of Labor of the United States, that from 1970 to 1973 I was a Trustee in Bankruptcy of the Penn-Central Railroad, and that I have had a good many years experience in the area of labor relations, as attorney, teacher, arbitrator and in other capacities.

Defendants in a litigation challenging compulsory union dues payments to the Brotherhood of Railway Clerks have asked me to make this affidavit, particularly concerning the plaintiffs' proposition that compulsory union dues authorized by Section 2, Eleventh, of the Labor Railway Act are confined in the case of any objecting employee to the union's expenditures in collective bargaining with his individual employer.

2. Although a system of collective bargaining exclusively on an employer-by-employer basis exists in some countries, this is not true in the United States. Such a system, broadly employed in Japan, has been called "entrepreneurial" or "enterprise" unionism; there an employer bargains with a local union which is unaffiliated with a national union. Although such a scheme does exist in some cases in the United States, it is unrepresentative and does not possess the peculiar characteristics of the Japanese system. Thus, the hallmark of Japanese bargaining is guaranteed life-long employment, a product of Japanese history and culture.

3. National unionism has been, almost from the very beginning, a

central feature of collective bargaining in the United States. This has been true notwithstanding enormous variations in product and labor markets, which in many cases have created exceptionally powerful local unions. The national unionism pattern is the product of several historical developments. The first nationalization catalyst was the felt need for benefits such as life, disability and health insurance, out-of-work payments, survivors benefits, and the like. Nearly all of the older unions developed such programs in their early years; despite the development of Social Security and employer-financed group programs these benefit plans continue today to serve significant functions.

An early scholar has described the role of such union benefits: "The insurance features have further been the means of securing and retaining members and thus building up the railway organizations as factors in collective bargaining. The power of the brotherhoods to secure satisfactory agreements with their employers is largely measured by the strength of the organizations, and that strength is usually in direct proportion to the development of their insurance systems. Thus, not only is insurance a prime support in collective bargaining of the unions; but it insures control in the exercise of that function. The infrequency of railroad strikes may have contributed to the almost perfect control of the head officials of the brotherhoods over their membership." J. B. Kennedy, "The Beneficial Features of the Railway Unions" in *Studies in American Trade Unionism*, ed. by J. H. Hollander and George E. Barnett, New York, 1906, pp. 348, 349.

From its origins to the present day, the central function of national unionism has been to provide aid to the constituent local units. This assistance typically includes furnishing advice and leadership in difficult local situations. The national union provides funds to support its affiliates during strikes or other emergencies. Such assistance is costly, and is financed from the national union's general revenues. However remote a local union may be in terms of geography or product market from the center of an industry, it may usually rely upon the national union's concern with the outcome of its local bargaining effort. The union slogan "An injury to one is an injury to all" reflects this interdependence.

5. One of the strongest impulses to national union organizations stems from the situation of the unionized employers who compete with the unorganized employers. No meaningful economic improvement is possible, and union representation itself is jeopardized, if substantial numbers of lower-paid workers remain employed in the industry. Indeed,

the original impulse to organize national unions arose from the widening of product markets. A classic description of this process was given in 1909 by John R. Commons in "American Shoemakers, 1648-1895: A Sketch of Industrial Evolution" (Quarterly Journal of Economics, November, 1909, pp. 39-84). Cf. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921).

6. A supportive reason for the growth and development of national unions was the necessity of dealing with the "traveling members" of local unions. Americans have always been a mobile people, and the movement of large numbers of skilled workers searching for jobs endangered the job security and working conditions of local workers. The national union alone is able to impose that discipline upon its traveling members, which is essential to the orderly functioning of collective bargaining. The *quid pro quo* which employers receive is a work force which will abide by the union agreement. The leading authority on the history of national unionism considers this discipline factor as the single most important reason for the growth of the national union. See Lloyd Ulman, *The Rise of the National Union*, Cambridge, 1955.

7. The interdependence of local unions aligned in a national organization is also exemplified by employer bargaining strategy. Commonly, separate units of the same employer negotiate different agreements. The Taft-Hartley Act forbids unions from insisting upon a consolidation of units, despite the obvious community of interests. But far more important is the place of association bargaining. Section 9(b) of the National Labor Relations Act means that multi-employer bargaining exists essentially at the sufferance of the employers. Moreover, since in dealing with wages and working conditions employers are as immune from antitrust restraints as are the unions, informal as well as formal combinations of employers are widely employed for bargaining purposes.

In the transportation sector, the coordination of collective bargaining serves the interests not only of the employees but also of employers. Accordingly, employers joined together many years ago for multi-employer bargaining with the nation's major railroad unions. The basic working rights of the transportation employees in various craft or skill categories have thus typically been resolved on a nationwide basis by multi-employer bargaining. The mutual aid plans among the railroads and the airlines, protecting each other against strike losses, demonstrate the extent to which the employers themselves have recognized their interdependency in collective bargaining.

8. The 1971 ruling by the United States Court of Appeals for the District of Columbia Circuit in *Delaware and Hudson Railway Co. v. United Transportation Union*, 450 F.2d 603, 608 was that while national resolution of disputes between carriers and unions is not expressly compelled by the Railway Labor Act, it is nevertheless obligatory in some circumstances "depending on the issues involved and the 'practical appropriateness of mass bargaining' for those issues and the 'historical experience' in handling similar national movements." The interdependence both of the employees and the employers is further underscored by the judicial confirmation in the *Delaware and Hudson* case (at 614) that by lockout action "carriers may make a national response to defend against a selective strike" against a single carrier.

9. These considerations underscore the unrealism of any effort by a union to advance the interests of workers of an employer in any major national industry, and particularly in transportation, by policies or actions separate and independent of the interests of other employees in the industry. The more organized the industry, the more successful will be the union's representation of any single employee unit, and vice versa. A strike by employees of one employer can mean lockout of the employees of another. A victory in collective bargaining for employees of one carrier will likely mean a victory for the employees of another. Conversely, a bargaining defeat for the employees of one carrier can mean defeat for employees of many other carriers. Accordingly, a national union in this industry seeking responsibly to protect the employees it represents must devote its resources for organization, collective bargaining, and strikes on a national rather than a unit-by-unit basis. The most energy may have to be expended on the weakest link in the chain, for a strike lost in Maine can mean defeat for employees in Oregon; a bargaining proposal defeated in Georgia can mean its defeat in California.

10. Congress has been fully aware of, and has codified, the national-based bargaining scheme in the transportation sector. This is reflected in the initial enactment of the Railway Labor Act in 1926 and its major amendment in 1934, and in the 1963 legislation to resolve the railway labor crew consist impasse on a nationwide basis under Public Law 88-108 (45 U.S.C., following §157). The same national perspective is reflected in the more recent AMTRAK and CONRAIL legislation (Public Law 92-316, 86 Stat. 227; Public Law 93-236, 87 Stat. 985).

11. Accordingly, it is my opinion that the provisions of the Railway Labor Act, including its Section 2, Eleventh authorizing compulsory

dues, must be read consonantly with the principles of employee interdependence and national-union organization and bargaining, upon which the transportation unions must base their policy decisions, actions, and expenditures in the interests of their entire membership.

Willard Wirtz
WILLARD WIRTZ

Subscribed and sworn to before me this 30th day of December, 1975.

Notary Public

My Commission expires: July 1, 1978

(Proof of service omitted in printing.)

JA-231 ENTERED FILED

JAN 21 1973 JAN 21 1973

CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,

Plaintiffs,

v.

BROTHERHOOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

Civil No. 73-113-N
Consolidated with
Civil No. 73-118-N

FINDINGS OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW

ALLAN FAILS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

This cause came on regularly for hearing and consideration before the Honorable Leland C. Nielsen on the motion of the plaintiffs, Howard Ellis, et al., Allan Fails, et al., individually and as class representatives, for summary judgment in the above entitled and consolidated cases, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court, having considered said motion and the opposition of defendants thereto, and having examined and considered the entire record in the matter, including the pleadings, depositions, affidavits, and memoranda filed in support of and in opposition to the said motion, the Court now finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiffs at the commencement of these actions were citizens of the United States, residing in the State of California and employed by Western Airlines at various locations in the State of California, including Los Angeles, San Francisco and San Diego.

2. Defendants Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and its subsidiary organizations, System Board of Adjustment No. 451, Skyliner Lodge Local 3001, Sky Harbor Lodge Local 3014, and Arrowliner Lodge Local 3049, are unincorporated associations and labor organizations whose purpose, in part, is the representation of employees for collective bargaining over wages, hours and working conditions within the meaning of Section Two of the Railway Labor Act. Defendant California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees is an unincorporated association, subsidiary to and affiliated with the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, which has as its purpose, in part, the sponsorship of legislation in the State of California. Defendants are hereinafter collectively referred to as "BRAC".

3. Defendants Local Lodges 3001, 3014 and 3049 are subsidiary to Defendant System Board No. 451, which is in turn subsidiary to the Grand Lodge of the Brotherhood of Railway, Airline and Steamship Clerks.

4. Western Airlines is a corporation authorized to and doing business in the State of California, engaged in the transportation of passengers and freight in interstate commerce.

5. At all times material, Western Airlines has maintained a collective bargaining relationship with BRAC governing the terms and conditions of employment of plaintiffs and Fails class members and BRAC has been, and is, the exclusive bargaining agent for the craft or class of employees in which they are employed.

6. Under the terms of the collective bargaining agreement in effect between Western Airlines and BRAC, effective October 1, 1969, and the Letters of Agreement of October 27, 1966 and February 26, 1971, made a part of and incorporated into the collective bargaining agreement, each

employee in a classification under the agreement was required to acquire and maintain membership in BRAC as a condition of employment after completion of the sixtieth day of employment, except that employees who were hired prior to October 27, 1966 and were not members as of that date were not required to acquire and maintain membership but only to tender to BRAC an agency fee equal to the initiation fee and monthly dues uniformly imposed on union members.

7. A communication issued by BRAC International President C. L. Dennis and published in the November, 1975 issue of the *Railway Clerk/ interchange* construed the BRAC Constitution as not requiring any employe represented by BRAC to become a formal union member as a condition for retaining his job rights or for qualifying for other generally available union benefits.

8. Plaintiffs Fails, Frost, Johnson, Erkman, Taylor, Brown, Nelson, Damante, Ryan, Grote, Ballard, Young, Douglas, Emminger and Wisor, hereinafter collectively referred to as the "Fails plaintiffs" are or have been members of defendant BRAC, employed by Western Airlines. On March 23, 1973, the Fails plaintiffs filed Case No. 73-118-N, for themselves and as class representatives.

9. The Fails plaintiffs' motion for determination of class action determination of all issues was granted in orders entered by this Court dated September 14, 1973 and April 8, 1975. The class includes all BRAC members employed or formerly employed by Western Airlines who submitted written objections as stated in paragraph 13 of the Fails complaint. Subsequent references to the "Fails plaintiffs" include the class members.

10. Plaintiffs Ellis, Balian, Sauls, Dean, Payne, Fontaine, and Loudin, hereinafter collectively referred to as the "Ellis plaintiffs," are or have been employees of Western Airlines who have declined to become members of defendant BRAC, but who have been obligated, as a condition of their employment, to tender agency fees to defendant BRAC equivalent to the membership dues and fees paid by members of defendant BRAC. On March 20, 1973, the Ellis plaintiffs filed Case No. 73-113-N.

11. Subsequent references to "the plaintiffs" include the Ellis plaintiffs, the Fails plaintiffs, and the Fails class members.

12. Except for the class allegations in Case No. 73-118-N, the allegations of the two complaints are essentially the same. The plaintiffs alleged that defendant BRAC expended compulsory dues and fees exacted from plaintiffs, over their written objections, for political and various other non-collective bargaining purposes. Plaintiffs alleged that these expenditures over their objections deprived them of their rights under the Railway Labor Act and the First, Fifth and Ninth Amendments to the United States Constitution, and constituted a breach by defendant BRAC of its duty of fair representation owed to plaintiffs. Plaintiffs further alleged that defendant BRAC's existing three and one-third cents dues reduction procedure was unavailable to plaintiffs and further that the procedure was arbitrary and discriminatory because it did not correlate with defendants' political and ideological expenditures. Plaintiffs sought declaratory and injunctive relief, money damages, attorneys' fees, and costs.

13. Plaintiffs and those class members falling within the territorial jurisdiction of the Defendant Local Lodges 3001, 3014 and 3049 pay dues and fees to the appropriate Local Lodge, to System Board No. 451, and to the Grand Lodge. Each Local Lodge remits 30 cents per person per month to the California State Legislative Committee. The remaining class members pay dues and fees to Local Lodges in their area, to System Board No. 451, and to the Grand Lodge. Thirty cents per month from their dues and fees is similarly sent to a State Legislative Committee.

14. Each plaintiff and class member has sent a written protest to BRAC, objecting to the contractual requirement compelling the payment of wages as union dues and fees. The language of each such protest is as follows:

> As an employee of Western Airlines, I feel that the Brotherhood of Railway, Airline and Steamship Clerks does not properly represent my interests and I protest the compulsory "agency fee" I must pay the Brotherhood of Railway, Airline and Steamship Clerks, in order to retain my job. In addition, I hereby protest the use of these fees for any purpose other than the cost of collective gargaining [*sic*] and specifically protest the support of Legislative goals, candidates for political office, political efforts of any kind or nature, ideological causes, and any other activity which is not a direct cost of collective gargaining [*sic*] on my behalf. I demand an accounting and refund from the Brotherhood of Railway,

Airline and Steamship Clerks of all fees exacted from me by the so-called "agency fee".

15. Each such protest was sent by certified mail. In some instances, delivery was refused; in others, the letters were discarded; in still others, the letters were received but not opened. Defendants did not respond to any of these protest letters.

16. When the protest letters were sent by plaintiffs, the BRAC Constitution contained the following refund device:

> Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third (3-1/3) cents per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues become effective with the month following the month in which the member notifies the Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

17. None of the plaintiffs' dues were reduced or refunded in the amount set forth in the BRAC Constitution. Plaintiff Ellis specifically requested the 3-1/3 cents per month reduction, but was told that nonmembers could not participate in the reduction scheme.

18. Approximately nine months after these suits were commenced, BRAC promulgated a Policy Statement (dated January 24, 1974) which established a procedure whereby objecting members and agency fee payers could secure a refund of that portion of their dues and fees which was expended upon "political purposes not germane to collective bargaining." Plaintiffs thereupon sought and obtained leave to amend their complaints.

19. The amendments allege that provisions of the Policy Statement are inconsistent with those of the BRAC Constitution, and that the Policy Statement is consequently invalid, as it was not adopted as a constitutional amendment. It is charged that the Policy Statement is part of a continuing bad faith effort by BRAC to deprive plaintiffs of constitutional and statutory rights. In addition to the relief requested in the complaints, plaintiffs pray:

(1) for an order determining that the adoption of the Policy Statement is void;
(2) for an order restraining defendants from subjecting persons represented by BRAC to the Policy Statement;
(3) for an order releasing objectors from any obligation to pay dues, fees, or assessments to defendants or any subordinate or affiliated organizations as a condition of employment;
(4) for damages, attorneys' fees, costs, and such other relief as the Court may deem proper.

20. Defendants raise the following affirmative defenses to the complaints, as amended:

(1) failure to state a claim upon which relief may be granted;
(2) failure to exhaust internal and administrative remedies;
(3) the bar of various statutes of limitations;
(4) preemption by the System Board of Adjustment, with regard to those claims arising out of the interpretation or application of the collective bargaining agreement.

21. Case No. 73-113-N and Case No. 73-118-N, pursuant to the stipulation of the parties and the order of this Court, have been consolidated for purposes of discovery and trial.

22. BRAC has engaged in the following activities since June 30, 1972:

(1) Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.
(2) Operation of a death benefit program.
(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.
(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:
  (a) employees not employed by Western Airlines;
  (b) employees not employed in the air transportation industry;
  (c) employees not employed in other transportation industries.
(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons.
(6) Contributions to charities and individuals.

(7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such programs secured for its salaried officers and employees.
(8) Conducting and attending conventions of BRAC.
(9) Conducting and attending conventions of other organizations and/or labor unions.
(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC.
(11) Support for or opposition to proposed, pending, or existing legislative measures.
(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions.

23. Funds for the activities listed in paragraph 23 are derived in part from the dues and fees plaintiffs are compelled to pay BRAC.

24. A portion of plaintiffs' payments to the Grand Lodge are placed in general fund accounts. The defendants have been affiliated with various non-BRAC organizations at times material hereto, and have contributed amounts from general funds to said organizations. Included among those organizations are:

> the AFL-CIO, the Canadian Labour Congress, the Congress of Railway Unions, the Council of AFL-CIO Unions for Professional Employees, the Union Label and Service Trade Department of the AFL-CIO, and Canadian Railway Office of Arbitration, the Canadian Railway Labour Association, the Cooperating Railway Labor Organizations, the Canadian Non-Operating Railway Unions, and the San Diego-Imperial Counties Labor Council.

The foregoing non-BRAC organizations engage in fraternal, social, and political activities; and they espouse positions on economic and ideological issues, through publications and other means.

25. The Railway Clerks Political League (RCPL) is an unincorporated association affiliated with BRAC. Its officers are all BRAC officers, and its activities are conducted by officers and employees of BRAC, whose compensation is paid entirely by BRAC. Office space, computer services, and other operating supplies and facilities are provided by BRAC at no charge. The funds for such undertakings are derived

from the BRAC General Fund, into which a portion of plaintiffs' dues and fees is commingled.

26. The RCPL supports or opposes political candidates, causes and legislation.

27. Funds for the RCPL are solicited by paid officers and employees of the Grand Lodge of BRAC and its subordinate and affiliated organizations, including the remaining defendant. These fund-raising activities include publications in the BRAC magazine, *Railway Clerk/ interchange*. and personal appeals at System Board and local lodge meetings. The direct and indirect costs of such fund-raising activities are paid by BRAC from general funds, and RCPL makes no reimbursement therefor.

28. Some amounts collected for RCPL are transmitted through the General Fund accounts of the Defendant Local Lodges, System Board #451, and Grand Lodge. RCPL funds have been utilized for the payment of employee salaries and other BRAC Grand Lodge operating expenses since prior to January 1, 1972.

29. BRAC has incurred costs for political activities from its General Fund for at least five to ten years.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties hereto, and over the subject matter hereof, under 28 U.S.C. § 1337.

2. Fails et al. v. BRAC, Case No. 73-118-N, is properly brought as a class action.

3. BRAC owes each plaintiff the fiduciary duty of fair representation.

4. Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152 *et seq.*, as construed by the United States Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784 (1961), is intended to force all employes covered by the Act to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.

5. The Railway Labor Act prohibits the use of fees and dues for non-collective bargaining purposes and activites, over protest from a represented employe.

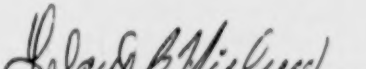
6. Those activities listed in Paragraph 22 of the Findings of Fact are non-collective bargaining activities as that term is defined in *Street, supra*.

7. BRAC's use of dues and fees of protesting employes for non-collective bargaining activities and purposes constitutes a breach of the fiduciary duty of fair representation BRAC owes to each plaintiff.

8. BRAC has further breached its duty of fair representation to plaintiffs by the following:

(1) refusing delivery of some of plaintiffs' protest letters, discarding some letters, and ignoring the balance of such letters;
(2) failing to make dues reductions of 3-1/3 cents per month to Fails plaintiffs and class members, as provided in the BRAC Constitution;
(3) excluding agency payers such as plaintiff Ellis form eligibility for the 3-1/3 cents dues reduction becaue of their non-membership;
(4) maintaining provisions in its constitutions (1967 and 1971) which were not good faith efforts to comply with its lawful obligations.

Dated: January 20, 1976



LELAND C. NIELSEN,
United States District Judge

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I hereby attest and certify on 1-22-26
that the foregoing document is a full, true and correct
copy of the original on file in my office and in my
legal custody.

CLERK, U.S. DISTRICT COURT
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By _____ Deputy

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FILED

APR 14 1976

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [illegible] DEPUTY

ENTERED

APR 14 1976

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [illegible] DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N AMENDED ORDER GRANTING INTERLOCUTORY SUMMARY JUDGMENT

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

In accordance with the Findings of Fact and Conclusions of Law in this matter and with Rule 56(c) of the Federal Rules of Civil Procedure, and the Court having determined that there are no genuine issues of material fact as to the issue of liability alone,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That an interlocutory summary judgment be entered for the plaintiffs and Fails class members (hereinafter collectively referred to as "plaintiffs") as to the issue of liability alone, the Court having found defendants to have breached their duty of fair representation as more fully set forth in the Findings of Fact and Conclusions of Law;

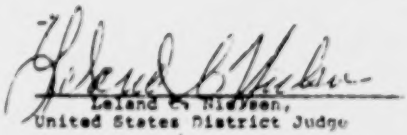
2. That summary judgment be denied as to each and every issue of damages, all such issues to be determined according to evidence to be presented at the trial phase of this litigation; and

3. That the Order herein involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Order may materially advance the ultimate determination of this litigation. Therefore, this Court certifies the following question to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. section 1292(b): Whether the Railway Labor Act and the duty of fair representation prohibit the expenditure of dues and fees over protest of represented employees for any purposes other than political purposes; and, if so, whether the Railway Labor Act and the duty of fair representation prohibit the use of dues and fees over protest from represented employees for non-collective bargaining purposes and activities; and, if so, whether expenditures of dues and fees over protest of represented employees for the purposes and activities listed in paragraph 22 of the

Findings of Fact filed herein on January 21, 1976 are expenditures for non-collective bargaining activities as to which protestors are entitled to dues rebates and/or reductions.

SO ORDERED.

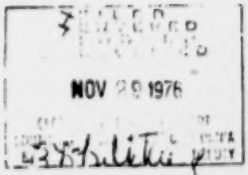
Dated: 4-13-76.



Leland C. Nielsen,
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA



HOWARD ELLIS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

CIVIL NO. 73-113-N
Consolidated with
CIVIL NO. 73-118-N

ORDER AMENDING INTERLOCUTORY SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION TO RELIEVE DEFENDANTS OF THE REQUIREMENT OF FURTHER ANSWER TO INTERROGATORY NUMBER FIVE

ALLEN FAILS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

The Court entered an interlocutory summary judgment for plaintiffs dated January 21, 1976. In conjunction with that summary judgment, the Court stated among its findings of fact that:

> 22. BRAC has engaged in the following activities since June 30, 1972:
>
> * * *
>
> (10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC."

Subsequent to the rendition of the summary judgment, plaintiffs propounded a fifth series of interrogatories, of which Interrogatory No. 5 sought to ascertain the expenditures of all organizations affiliated with

BRAC for activities listed in Paragraph 22 of the Court's findings of fact. Defendants prepared and served a partial response, and on November 4, 1976, filed a motion to obtain relief from submitting further answers to that interrogatory.

Upon consideration of defendants' motion, the response filed by plaintiffs, the presentation of oral argument and related research, the Court deems it appropriate:

(a) to clarify its earlier ruling so as to delimit the scope of costs chargeable against plaintiffs to those of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes incurred by the defendants in the representation of plaintiffs with Western Airlines; and

(b) to relieve defendants of the requirement of further answer to Interrogatory Number 5.

IT IS THEREFORE ORDERED AND ADJUDGED that Paragraph 22 (10) of the Court's findings of fact issued in conjunction with the summary judgment dated January 21, 1976, be withdrawn, and the findings of fact, conclusions of law, and interlocutory summary judgment are hereby amended by substitution of the following finding of fact:

> "22. BRAC has engaged in the following activities since June 30, 1972:
>
> * * *
>
> (10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements with Western Airlines, or settlement or adjustment of grievances or disputes of employees of Western Airlines."

AND IT IS FURTHER ORDERED AND ADJUDGED that defendants are relieved of the requirement of further answer to Interrogatory Number 5 in plaintiffs' fifth series of interrogatories.

DONE AND ORDERED THIS 29 day of November, 1976.

LELAND C. NIELSEN, JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N AFFIDAVIT OF WILLIAM L. SCHERI

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

WILLIAM L. SCHERI, being duly deposed and sworn states as follows:

1. I am the Assistant Airline Coordinator of the International Association of Machinists and Aerospace Workers. For some 20 years I have been employed in capacities related to the Airline Division of the Machinists Union. Our union represents some eighty thousand airline employees on 140 carriers and service companies. While we have achieved wide organization of ground service employees among airline clerks neither we nor other unions have achieved their organization on the largest carriers, and there are also many unorganized subcontractors performing work in various categories.

2. In connection with a pending litigation I have been asked to describe the effect upon employment security and working benefits of organized employees in the industry from the substantial number of unorganized carriers and subcontractors. It is my opinion from many years of experience and many individual bargaining situations that the employment security and working benefits of the organized employees in the industry are jeopardized and diminished by the substantial numbers of unorganized carriers and subcontractors, so that extension of organization strongly reinforces the employment and working benefits of those already organized. Our experience falls into three separate areas: (A) preserving employment for organized workers; (B) negotiating benefits for organized employees; and (C) winning strikes for improved working rights.

A. Preserving Employment for Organized Workers

It has been our bitter experience time and again that the existence of unorganized carriers threatens and impairs the employment security and work benefits of the organized. One recent example involves the loss of

the contract held by TWA at the Kennedy Space Center in Florida, where we had a collective-bargaining agreement. The existence of substantial unorganized and lower paid work forces in the Florida area put TWA at a disadvantage in bidding for continuation of the contract at the Space Center, and when TWA lost the contract in 1971 many of our people had to move away to other employment.

We had a similar experience with Lockheed Air Terminal, a fueling company at New Orleans, when in 1973 it was underbid on its contract by General Aviation, another fueling company which was unorganized and could offer lower rates.

We had a similar experience at Kansas City in March of 1977 where TWA was performing flight kitchen catering for United Airlines using our employees. When TWA asked for a cost increase based on the negotiated pay increases for our workers, United Airlines shifted to an independent unorganized contractor (Marriott).

Another example of the loss of work for the organized employee is Ransome Airlines at Philadelphia. It has moved unorganized maintenance employees into that station to accomplish the fueling operation formerly performed by our organized employees of Allied Aviation and Atlantic Aviation. Industrial Relations officers of Allied have even urged us to organize the other operators, because Allied is being underbid and losing contracts and thus we are losing members and employees.

A similar situation exists on foreign flag carriers. Marriott is unorganized and can underbid any organized kitchen. Between 1972 and 1975 we lost the flight kitchen operations on KLM, Air France, Lufthansa and Swiss Air. For similar reasons, among foreign flag carriers we have lost a large group of members working in airline cargo facilities performing loading operations which were once done by airline employees under negotiated agreements. There is a similar situation with respect to stock clerks who used to do the warehousing, shipping, receiving and storing which is now subcontracted to non-union vendors.

For similar reasons, maintenance work on aircraft at Eastern Airlines is being farmed out to local non-union operators all over the country. Eastern Airlines has frequently cited the lower costs of non-union contractors for farming out mechanical, stock clerk and fueling work.

Even where we have not actually lost members and employment due to the pressure of the unorganized employer, we are still constantly threatened with that possibility and must exert valuable bargaining chips to keep carriers from farming out work of our employees to non-union contractors. Northwest Airlines has threatened to close their flight kitchens and rely on Marriott or some other unorganized producer; in 1977 negotiations over the Anchorage flight kitchen, Northwest announced its plan to open three additional stations but emphasized that if our wage demands were met they would be priced out and would cancel the expansion. The Flying Tiger Line has threatened to farm out the plant security work to unorganized and lower-cost operators such as Burns or Wackenhut. Our flight kitchen operation is constantly threatened by unorganized companies such as Dobb's House and Sky Chef bidding at lower cost than Continental, which we have organized. The same is our experience with TWA on automotive equipment, truck repair, engine overhaul, accessory units, etc. We are constantly either trying to retain this work, by browbeating the Company or in grievance procedures, while the Company claims it can do the work cheaper with outside unorganized jobbers.

The above are some of the situations where we have lost work for our organized people or are threatened with loss of work and must use some of our bargaining chips to hold on to work because of the existence of unorganized lower rate competitors and contractors.

B. **Negotiating Benefits for Organized Employees**

An equally severe problem is the bad effect upon our ability to obtain benefits for our organized workers while there remain so many unorganized carriers and contractors. The airlines have become very competitive in recent years and are in a tight money situation. We constantly meet the assertion by organized carriers that they cannot meet our wage and benefit demands because of unorganized competition. For instance, TWA frequently points to Delta, an unorganized competitor. In the 1976 negotiations with Altair Airlines it pointed to competition from Atlantic Aviation in Wilmington, which is unorganized and pays lower wages.

We have several contracts with small support companies doing baggage-handling, fueling and maintenance for various airlines. The companies we represent assert at the bargaining table that our demands would increase their costs to the point of making them non-competitive

with the unorganized companies. Indeed, on at least two occasions these companies have urged us to organize their competitors (Ground Service International and Monarch Air Services) to assure continued employment for our members. Similarly, company negotiators in recent bargaining efforts with Ozark Airlines, Butler Aviation and Allied (O'Hare), resisted increases in prolonged negotiations on the grounds that their competitors pay less to unorganized workers.

Another recent example involves Allegheny Airlines. Under the Allegheny commuter agreement (the M-298 program) in 1975 we had to agree to a special set of work rules on this division with lower wages and fringe benefits for our members because the company repeatedly urged its need to remain cost-competitive with unorganized commuter lines, pointing particularly to Ransome Airlines as a reason for holding down our members' wage and benefit demands. The clear result is that workers we represent are earning less because other carriers are unorganized.

The same problem exists on Air Wisconsin, where we represent mechanics and related workers as well as the clericals. The Company consistently argues against our contract demands on the ground that with comparable air fares their unorganized competitors with lower labor costs have an unfair advantage. The same point is made by Page Airways whose chief negotiator Luss has been adamant that our demands would put the Company out of operation due to competition with unorganized Northern Airmotive at Minneapolis.

There are many similar examples showing how we are limited in our bargaining power for our organized workers while there are unorganized competitors, and that we could do far more for our people if more workers in the industry could be organized. Currently we are petitioning for representation on Marriott, one of the worst offenders. We are slowly making headway, but organizing is difficult and expensive and there are a great many separate employers to be dealt with at separate locations.

C. Winning Strikes for Improved Working Rights

Another serious problem in winning benefits for our workers relates to the difficulty of winning strikes for improved benefits while competing carriers remain unorganized. This is a result of a special agreement in the airline industry known as the Mutual Aid Pact. That pact has been the subject of much public discussion and Congressional attention because

of its inhibiting effect upon the use of the strike to win working rights for airline employees.

Here is why unions are hurt under the MAP arrangement by unorganized carriers. MAP gives a struck carrier compensation, from a fund created jointly by the carriers, to the extent that it loses business to other carriers during the strike. In other words, if a union strikes a carrier who thus loses customers to unorganized carriers whom the union cannot strike, then to that extent MAP repays the loss of revenue to the struck carrier.

When we can organize the MAP carriers the situation is quite different. We can then strike competitors in MAP simultaneously, preventing their shift of traffic from one carrier to another and thus the return of funds to that carrier by the others which permits it to hold out indefinitely against a strike. That is what we did in 1966 when for ground service employees and mechanics we struck five carriers simultaneously. In other words, we greatly improve the bargaining power of our employees when we can organize similar employees of the carriers in MAP. That directly benefits the employees already organized, by preserving their strike weapon for improved working benefits.

3. Based on the above, it is my expert opinion that organizing more of the unorganized employees in the airline industry, and particularly in the underorganized clerks category, substantially benefits those who are already organized. *First,* it protects them from loss of employment due to loss of contracts or to subcontracting, as indicated above in 2A. *Second,* it enhances their bargaining power by removing the competitive advantage of the unorganized carrier or contractor, which necessarily limits the wage and benefits options of organized carrieres, as indicated above in 2B. *Third,* it makes the strike a more viable weapon for winning improved working rights, because it limits the operation of MAP which prolongs strikes and makes them difficult to win, as indicated above in 2C.

It is my overall opinion that the airlines industry is peculiarly one in which there is a nationwide interdependence of employees, and that nothing more assists those already organized than the achievement of further organizing success.

William L. Scheri
WILLIAM L. SCHERI

Subscribed and sworn to before me
this 17th day of November,
1977.

Parker D. Joyce
Notary Public, D. C.

My Commission expires: 11-30-78

(Proof of service omitted in printing.)

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Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

CIVIL NO. 73-113-N
Consolidated with
CIVIL NO. 73-118-N

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF FINAL ORDER

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

* * * *

[2] Plaintiffs again substitute rhetoric for fact and argument when they refer to a "series of transactions in which BRAC 'laundered' $100,000 so as to convent it into 'hard money' for political contributions" (p. 10). But this *trade* of *excess* voluntary political contributions to another union for regular dues money is long-standing and wholly unchallenged labor union practice. Actually plaintiffs *benefited* from BRAC trading voluntary political contributions (to which plaintiffs did not contribute) for regular dues money, thus increasing the dues funds to which they do contribute.

(Proof of service omitted in printing.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N PRE-TRIAL ORDER

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, IT IS ORDERED:

I

This is an action: For the recovery of monies paid as union dues and fees by plaintiffs to defendants; for an adjudication as to the payment of future amounts for such purposes; and for adjudication of various union actions relating to the collection and use of dues and fees, the implementation and operation of defendants' dues rebate procedures, and the exclusion of certain persons from union activities, all of which are alleged to violate the union's statutory duty of fair representation. Plaintiffs further claim that the collection and use of their dues and fees for purposes other than collective bargaining between defendants and Western Airlines violates their rights secured by the First, Fifth and Ninth Amendments to the United States Constitution.

As used herein, "plaintiffs" denotes the named plaintiffs in both of these consolidated actions, and the *Fails* class members. As used herein, "BRAC" includes the following defendants: The Grand Lodge of the Brotherhood of Railway, Airline and Steamship Clerks, System Board of Adjustment No. 451, Local Lodges 3001, 3014 and 3049, and the California State Legislative Committee (which went out of existence on July 1, 1977).

The pleadings giving rise to the issues herein are the complaints filed in the *Ellis* and *Fails* cases, amendments to those complaints, and the answers and amended answers to same. This Court has already granted to plaintiffs an interlocutory summary judgment as to the issue of liability, leaving for resolution at trial the issue of damages and relief for the future (Order of January 21, 1976, as amended April 14, 1976 and November 29, 1976).

II

Federal jurisdiction and venue are invoked upon the ground: That rights secured plaintiffs by the United States Constitution have been abridged unlawfully by defendants. In addition, jurisdiction is premised upon 28 U.S.C. § 1337, as the statutory rights and obligations adjudicated herein arise under a statute (the Railway Labor Act, 45 U.S.C. § 151, et seq.) regulating interstate commerce. Venue is premised upon the fact that certain of the plaintiffs and defendants are residents of, and doing business within, the Southern District of California.

III

The following facts are admitted and require no proof:

1. Since prior to 1971, BRAC has held a certification issued by the National Mediation Board, a federal governmental agency, as the exclusive representative of "the craft or class of Clerical, Office, Fleet and Passenger Service Employees, employees of Western Airlines, Inc." As of December 31, 1977 BRAC and its subordinate bodies comprised a total membership of 202,582 (143,154 active), of whom 19,915 (17,151 active) are in Canada. Of the total union membership, the air transportation industry accounts for approximately 5% and the railroad industry accounts for approximately 85%.

2. Plaintiffs and defendants agree that formal union membership cannot lawfully be required of employees, and pursuant to defendants' statement of this position during the course of this litigation, certain of the *Fails* plaintiffs and class members have resigned formal union membership, assuming the status of agency fee payers.

3. Plaintiffs have each paid dues to BRAC in these amounts:

$11.00 per month until June 1, 1975, of which $4.20 went to the Grand Lodge, $4.20 to System Board 451, and $2.60 to the Local Lodge (of which 30¢ per member per month was sent by the Local to the California State Legislative Committee).

$15.00 per month until July 1, 1977, of which $5.20 per month went to the Grand Lodge, $6.20 to System Board 451, and $3.60 per month to the Local Lodge (of which 30¢ per member per month was sent by the Local to the California State Legislative Committee).

$17.00 per month since July 1, 1977, of which $6.10 per month goes to the Grand Lodge, $6.90 to System Board 451, and $4.00 to the Local Lodge (of which 30¢ per member per month is sent to the Grand Lodge, earmarked for regional political action committees).

BRAC dues in Canada follow:

$7.50 per month from January 1, 1972 until July 1, 1975, of which $3.35 per month went to the Grand Lodge, $2.60 to the System Board, and $1.55 to the Local Lodge.

$11.00 per month from July 1, 1975 to June 1, 1976, of which $4.20 per month went to the Grand Lodge, $4.20 to the System Board, and $2.60 to the Local Lodge.

$11.50 per month since June 1, 1976, of which $4.20 per month went to the Grand Lodge, $4.20 to the System Board, $2.60 to the Local Lodge and 50¢ to the Canadian division.

4. Plaintiffs and defendants agree upon the following procedure for stipulating the amounts which plaintiffs have paid to the defendants as dues and fees since July 1, 1972: Plaintiffs will submit to defendants within 30 days of the date of this order a list of the full names and addresses of all persons they assert to be plaintiffs at the present time and the date each such plaintiff sent a written protest to BRAC objecting to the contractual requirement compelling payment of union dues and fees. Defendants will submit to plaintiffs within 30 days thereafter the amounts of dues and fees paid by each plaintiff from the date of protest through 1977 and the amount of rebate each plaintiff has received in that period.

5. There is set forth below the number of WAL active members and agency fee payers and the number of non-WAL active members and fee payers as of December 31 of the relevant years:

	WAL employees	Non-WAL employees
1972		
System Board 451	3,752	11
Local Lodge 3001	543	0
Local Lodge 3014	187	0
Local Lodge 3049	1,526	0

1973		
System Board 451	3,841	70
Local Lodge 3001	522	70
Local Lodge 3014	216	0
Local Lodge 3049	1,560	0
1974		
System Board 451	3,677	42
Local Lodge 3001	527	12
Local Lodge 3014	208	0
Local Lodge 3049	1,534	0
1975		
System Board 451	3,622	83
Local Lodge 3001	443	11
Local Lodge 3014	200	24
Local Lodge 3049	1,466	0
1976		
System Board 451	3,730	91
Local Lodge 3001	448	11
Local Lodge 3014	211	21
Local Lodge 3049	1,319	0
1977		
System Board 451	3,886	80
Local Lodge 3001	472	6
Local Lodge 3014	210	25
Local Lodge 3049	1,383	0

From July 1, 1971 until July 1, 1977 non-WAL employees represented by System Board 451 paid $11.00 dues per month, of which $4.20 went to the Grand Lodge, $4.20 to the System Board and $2.60 to the Local Lodge.

From July 1, 1977 to December 31, 1977, Las Vegas Baggage Handlers (Local 3039) and Ward's Skycaps (Local 3001) paid dues in the amount of $13.00 of which $5.45 went to the Grand Lodge, $4.95 to the System Board, and $2.60 to the Local Lodge. Allied Skycaps in Local 3039 and Local 3014 also paid $13.00 in dues, but the System Board's share in the amount of $4.95 went to the Allied Service Division. Allied Claim Attendants (Local 3039) paid dues in the amount of $10.00, of which $4.20 went to the Grand Lodge, $3.80 to the System Board and $2.00 to the Local Lodge.

BRAC received the above dues from, and incurred expenses in representing, said non-WAL employees.

The non-WAL employees referred to above have thus paid a dues rate lower than that charged Western Airlines employees. In addition to the non-WAL employees listed above, defendants have provided representation and incurred expenses in providing such representation to a small number of persons employed by employers other than Western Airlines, but no fees or dues have been charged such persons for said representation. This has generally occurred in states with Right-to-Work laws or prior to the negotiation and signing of the first collective bargaining agreement in accordance with the practice of BRAC and other unions.

6. On January 24, 1974, BRAC adopted a political dues rebate plan. On November 11, 1974 this Court ruled that said rebate plan contained an erroneous standard as a matter of law. In May, 1975, the operative provisions of the January 24, 1974 plan were incorporated in BRAC's Constitution. On October 6, 1975, defendants established a new political-ideological rebate procedure available to any BRAC dues or fee payer who objects to political or ideological use of his payments. Pursuant to said rebate procedure, defendants' Board of Trustees determined that 4.68% of BRAC monthly dues during 1975 was for political-ideological causes, and that 4.9% was expended for such causes during 1976. Each plaintiff in this case has been sent rebate checks by defendants based on the 1976 percentage of political-ideological expenditures (4.9%) from July 1, 1972 or date of employment, whichever was later, through 1976. The 1977 percentage of political-ideological expenditures has not yet been computed.

Leaving out the plaintiffs in this case, the total number of employees represented by BRAC requesting rebates under the October 6, 1975 rebate procedure was 201 in 1976 and 153 in 1977. No one has ever sought review by the Public Review Board of the amount set for political rebates.

IV

The reservations as to the facts recited in Paragraph III above are as follows:

1. Defendants reserve the right to object to the introduction of evidence concerning the January 24, 1974 dues rebate plan referred to in III, 6 above. Defendants contend that such evidence would be irrelevant because that plan was superseded by the October 6, 1975 political-ideological rebate system, which system satisfies the Supreme Court decisions in *Street* and *Allen* and was implemented retroactive to July 1, 1972 or date of employment, whichever was later.

2. Plaintiffs reserve the right to object to the introduction of evidence concerning the total number of employees represented by BRAC requesting rebates under the October 6, 1975 rebate procedure on the ground that the number of such persons is irrelevant to the validity of the procedure.

The following facts and conclusions, though not admitted, are not to be contested at the trial, as follows:

The Findings of Fact and Conclusions of Law set forth in this Court's interlocutory summary judgment dated January 21, 1976 are conclusive for purposes of the trial and shall not be subject to challenge or supplementation by evidence or legal argument at the trial. The findings of fact set forth in the interlocutory summary judgment dated January 21, 1976 continue to describe accurately the status and activities of the parties hereto, with the exception that certain of the *Fails* plaintiffs and class members have resigned formal union membership, as noted in III, 2 above. Further, subsequent to the entry of the interlocutory summary judgment dated January 21, 1976, BRAC has reaffiliated with the Railway Labor Executives Association, with attendant costs, which are rebatable under the October 6, 1975 political rebate procedure.

VI

Defendants assert that the following issues of fact, and no others, remain to be litigated upon trial:

> Defendants have stipulated that the final judgment in this case may direct a refund to the plaintiffs of the full amount of their Grand Lodge dues (less rebates already made for Grand Lodge political and ideological expenditure) from the date of their formal protest to BRAC to January 1, 1976, such refunds to be payable when and if the Court's ruling on liability is sustained upon appeal. Based on this stipulation and on the

interlocutory summary judgment of January 21, 1976, as amended, the following are the issues of fact to be litigated upon the trial:

1. The amount of BRAC expenditures for political ideological causes and the validity under *Street* and *Allen* of the political-ideological rebate system of October 6, 1975 as adopted and implemented.

2. The amount of the Grand Lodge expenditures other than on collective bargaining with Western Airlines during 1976 and 1977, and the appropriate method for determining such expenditures for the future.

3. The amount of the System Board and defendant Local Lodges expenditures other than on collective bargaining with Western Airlines from the date of plaintiffs' formal protest to BRAC to December 31, 1977, and the appropriate method for determining such expenditures for the future.

Plaintiffs assert that the following issues of fact, and no others, remain to be litigated upon trial:

1. Whether an accurate determination of the costs of collective bargaining between BRAC and Western Airlines can be made. If so, what is the measure of damages to which plaintiffs are entitled? It is plaintiffs' contention that the Court has ruled that BRAC cannot lawfully charge them with the costs of activities other than collective bargaining with Western Airlines for the plaintiffs' bargaining unit. Those costs which plaintiffs contend are non-chargeable include: (a) those activities described in paragraphs 22, 24, 25, 27 and 29 of the interlocutory summary judgment dated January 29, 1976, (b) the costs of collective bargaining for other groups of employees represented by BRAC, and (c) the costs of institutional programs and activities.

Plaintiffs further contend, contrary to defendants' position, that defendants' profferred refund of Grand Lodge dues set forth above provides no basis for the exclusion of evidence as to Grand Lodge activities and expenditures prior to January 1,

1976, as such evidence relates to the calculation of plaintiffs' damages and formulation of relief to be granted plaintiffs.

VII

The parties are hereby ordered to file the exhibit list called for by Rule 9(g) of the Local Rules for the United States District Court for the Southern District of California and to serve same upon one another, within sixty days from the date hereof. Within thirty days thereafter, upon reasonable notice, the parties are ordered to make available for inspection their proposed exhibits.

VIII

Within sixty days from the date hereof, the parties shall file and serve their respective witness lists, identifying said witnesses by name, address, affiliation, and title.

IX

The following issues of law remain either to be litigated at trial, or incorporated in the final judgment:

1. Defendants contend that the non-collective bargaining expenditures of defendants' System Board and Local Lodges are *de minimis non curat lex*. Whether the amounts of those expenditures (as determined under VI above) are *de minimis*, and the formulation of relief with respect to such expenditures, if they are not, remains for determination. Plaintiffs contend that the doctrine of *de minimis* has no application to the case at bar.

2. Plaintiffs contend that agency fee payers cannot be required to resort to union-administered procedures, such as a dues rebate procedure and they further contend defendants have conceded the correctness of this contention. Plaintiffs also contend that, even as to those who are formal union members, the BRAC dues rebate procedure causes an unconstitutional prior restraint, deprives them of their property without due process of law, and that through its design, structure, and operation it subjects said plaintiffs to arbitrary and burdensome requirements and economic penalties, all in breach of BRAC's duty of fair representation. Defendants assert that the October 6, 1975 dues rebate system fully meets the requirements of *Allen* as to both agency fee payers and formal union members and that they have made no concession as claimed by plaintiffs.

3. Plaintiffs contend that BRAC's expenditure of plaintiffs' dues and fees for purposes and activities other than collective bargaining with Western Airlines is not only a breach of the duty of fair representation imposed upon BRAC by the Railway Labor Act, but is also a violation of plaintiffs' federal constitutional rights. Plaintiffs contend that the Court has not ruled on this matter but has only reserved its ruling thereon. Defendants contend that the Court has made clear its position not to go beyond plaintiffs' statutory claims.

4. Plaintiffs contend that an accurate determination of the costs of collective bargaining between BRAC and Western Airlines cannot be made and that they are entitled to the return of all dues and fees paid subsequent to their protest letters, and to an injunction relieving them from future dues and fees payments until such time as BRAC has established to the satisfaction of the Court that it has implemented a system which will insure that plaintiffs are charged only for an accurately calculated amount representing their chargeable share of the costs of collective bargaining with Western Airlines. Defendants contend that the requisite determination of such costs can be made and that there is therefore no basis for plaintiffs' contention herein.

5. Defendants contend that the cost of defending these cases is chargeable against plaintiffs as a cost of administering the collective-bargaining agreement with Western Airlines. The Court has ruled for defendants on this issue, but plaintiffs intend to present a motion for reconsideration thereon.

6. Plaintiffs contend that they are entitled to attorneys' fees herein, and the Court has indicated that it does not intend to grant such fees. Plaintiffs will submit a motion for clarification and/or reconsideration on that issue.

7. Plaintiffs contend that they are entitled to a declaratory judgment invalidating alleged BRAC requirements of formal union membership, and enjoining the application of such requirements. The Court has ruled that this issue is moot upon the assertion of defendants' counsel that formal union membership is not required. Plaintiffs intend to make a proffer of facts as set forth in Plaintiffs' Pre-trial Memorandum of Contentions of Fact and Law at 7, line 4 through 8, line 2 at trial.

8. Plaintiffs contend that they cannot be charged with a share of the cost of any waste or corruption on the part of defendants. Defendants

contend that amounts so expended, if any, (as well as amounts expended by defendants through mismanagement or inefficiency, if any), are not recoverable herein, and the Court has sustained defendants' position. Plaintiffs will present a written proffer of evidence supporting their position.

9. Plaintiffs contend that defendants must demonstrate some benefit flowing to plaintiffs from collective-bargaining activities as a condition of charging plaintiffs for any portion of the costs of those activities. Defendants contend that they need not do so and the Court has sustained defendants' position. Plaintiffs will present a written proffer of evidence supporting their position.

10. On November 11, 1974 this Court ruled that the dues rebate scheme promulgated by BRAC on January 24, 1974 contained an erroneous standard as a matter of law. Plaintiffs contend that this dues rebate procedure was not a good-faith effort to comply with BRAC's obligations under *Street* and *Allen*. Plaintiffs further contend that BRAC's enactment of the operative provisions of the January 24, 1974 dues rebate procedure as an amendment to the BRAC constitution following the entry of this Court's order that it contained an erroneous standard as a matter of law, was a breach of the Union's duty of fair representation. Defendants contend that the payment under the October 6, 1975 dues rebate procedure back to the date of protest fully compensates plaintiffs for any damages they may have suffered.

11. Defendants have stipulated that strike benefits will be paid to agency fee payers with no requirement being imposed upon such persons other than that of refraining from working for Western Airlines during the time for which said benefits are paid. The Court will incorporate injunctive provisions in its final judgment requiring compliance with this stipulation.

12. In connection with order and burden of proof, defendants' position is as follows:

> Defendants will present their case in chief first at trial since, in accordance with the specific language of the Supreme Court in *Allen*, the defendants bear the burden of proving the proportion of political to total union expenditures. Similarly, defendants bear the burden of proving the proportion of expenditures for purposes and activities other than collective

bargaining with Western Airlines to total union expenditures. Absolute precision in the calculation of such proportions is not required.

Plaintiffs' position is as follows:

Defendants will present their case in chief first at trial since, in accordance with the decision of the Supreme Court in *Allen*, the defendants bear the burden of proving the amounts of chargeable and non-chargeable expenditures. Plaintiffs contend that defendants bear the burden of proving the amounts expended by them for collective bargaining with Western Airlines; further, that the defendants bear the burden of proving that amounts claimed to represent collective bargaining expenditures are accurate.

X

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and goverr the course of the trial of this cause, unless modified to prevent manifest injustice.

Date: 4-11-78

/s/ Leland C. Nielsen
UNITED STATES DISTRICT JUDGE

Approved as to form and content:

Michael E. Merrill
Michael E. Merrill
Attorney for Plaintiffs

Joseph L. Rauh, Jr.
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

- - -

HONORABLE LELAND C. NIELSEN, JUDGE PRESIDING

- - -

HOWARD ELLIS, et al, ALLEN FAILS, et al, Plaintiffs, v. BROTHERHOOD OF RAILWAY, et al, Defendants.	Civil No. 73-113-N Civil No. 73-118-N

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California

Monday, January 16, 1978

APPEARANCES:

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[2] SAN DIEGO, CALIFORNIA, MONDAY, JANUARY 16, 1978, AT 10:30 A. M.

. . .

THE CLERK: No. 17 on calendar, Case No. 73-113-N and 73-118-N, Howard Ellis and Allan Fails v. Brotherhood of Railway.

THE COURT: How long do you expect to take in that matter, Mr. Merrill?

MR. MERRILL: I would expect our presentation will take about thirty minutes.

THE COURT: And you, Mr. Rauh?

MR. RAUH: Well, your Honor, I have to say that I think on the four matters that are up before the Court, not on the pretrial, thirty minutes is satisfactory. I'm not sure about how much time on the pretrial.

THE COURT: Well, as to the pretrial, I propose to lock you two in the jury room until you get a pretrial order out.

MR. MERRILL: If you do that, who is going to try the case?

(Other matters called.)

THE COURT: All right, Mr. Merrill and Mr. Rauh.

Let me first say about your letter, Mr. Merrill, that you want to send to the class plaintiffs, with your suggested changes in your letter of January 6, 1978, it appears proper to me.

MR. MERRILL: Thank you, your Honor.

MR. RAUH: I didn't hear it, sir?

THE COURT: Talking about his proposed communication to the Fails class that he submitted on the 21st of December that you [3] objected to, I say that as far as I'm concerned, that letter appears all right to me with the modification suggested in his letter of January 6th.

MR. RAUH: May I be heard on that, sir?

THE COURT: Yes.

MR. RAUH: May it please the Court, the modification is not on the major points, your Honor. The major point is this: Mr. Merrill is telling this class what is not so. He is telling them, your Honor, that if they don't resign, they won't get the benefit of your Honor's Paragraph 22 ruling for the future. That is not true.

THE COURT: Well, he doesn't say that they won't, but he says that they might not, and they might not, as I view it.

MR. RAUH: No, there's no chance that they won't, and I want to explain why, sir.

Your Paragraph 22 ruling is an extension of Street and Allen. It said that Street and Allen stand for the proposition different than I believe they stand for but that's the law of the case, that Street and Allen mean nongermane, noncollective bargaining items must be returned all apart from political and ideological causes.

Now, Street and Allen have always applied to members in the formal sense and fee payers. The logical extension will always apply to members and fee payers and I stipulate right here on the record that whatever the ultimate decision of this Court, upheld on appeal, on the nongermane, noncollective bargaining items, they [4] will apply equally to members as to nonmembers and this idea that they might not apply to nonmembers simply isn't so. Whatever is decided will apply to nonmembers and to members identically as we now apply Street and Allen identically. Indeed, the rebates that go out now under the October 6th rebate plan, October 6, 1975, go to members and nonmembers. Nobody ever thought that there was any difference. Nobody has ever suggested in this case that there's any difference, and I stipulate that there is no difference as far as the union is concerned. They'll both get whatever is ultimately decided should be rebatable and, therefore, the letter is on a false premise. It will induce people to resign on the theory they have to in order to get the advantage when I now stipulate that they don't have to in order to get the advantage, and I most urgently ask your Honor to reconsider because this is a very important matter.

THE COURT: I don't think there are enough people involved that it makes that much difference, Mr. Rauh.

MR. RAUH: It makes a great difference in principle. We believe that whatever is decided is the same for both groups. Furthermore, I don't know exactly why they are so anxious to have these resignations since we'll appeal, since we'll give them the same thing whether it's the one or the other. I think the letter ought to be accurate. The letter goes out with your having not objected to it, and I think the letter ought to be accurate. There's never been a suggestion in this case, in any other case, [5] in any literature, in anything, that there's a difference between the two groups as far as getting their rebates and I hereby stipulate, as I said before, that there's no difference. And I just plead with you not to allow a letter to go out that is clearly erroneous.

THE COURT: Mr. Merrill?

MR. MERRILL: Your Honor, the principle having importance here is not one of equal treatment of members and agency fee payers in terms of returning to them, or refraining from spending a portion of their dues. The principle to which Mr. Rauh has not adverted is BRAC's desire to maintain disciplinary control over these people so that they will always act at the beck and call of BRAC officers whom they have gone to considerable length to state a disagreement with.

Now, Mr. Rauh cannot conclude the Supreme Court or this Court or the Ninth Circuit by his stipulation as to what may happen in the future and just as the Supreme Court did in Scofield, so will they in this case, find that one who remains a member of the union is subject to its disciplinary control, subject to its internal administrative rules. There isn't any mystery at all in my mind as to why he's straining so hard to keep those people in the corral that were pushed in there by an admittedly unlawful union membership requirement. I think the issue is that simple. If he wishes to appeal to their loyalty, if his client wishes to sell them on the virtues of remaining formal members, they are absolutely entitled [6] to do so, again within the confines of this Court's order. I think that he is asking this Court to preserve the effects of admittedly unlawful coercion when he says we cannot communicate with them to advise them of our own opinions as their representatives as to what the consequences are of remaining members as opposed to agency fee payer status.

We could be wrong. He could be wrong. I think that he ought to put forth his view and let the persons most concerned with this issue decide for themselves. They have never been told what difference it may make to be an agency fee payer as opposed to a member, and we know from

reading the cases, that it makes a lot of difference. The Ninth Circuit specifically said in the Hershey Food case the difference is more than semantic, and I think that these people are at minimum entitled, in view of this defendant's method of having conscripted them in the first place, to find out that the difference is more than semantic. Thank you.

MR. RAUH: If your Honor please, the point Mr. Merrill makes about the discipline--he has every right to tell them that. There is a difference between a fee payer member and a formal member on the discipline. I don't question he can tell them about that. He can tell them about any difference that exists, but I don't think he ought to be allowed to tell them about a difference that doesn't exist, your Honor.

THE COURT: I'm happy with the letter, with the January 6th modification, gentlemen.

[7] We'll hear your motion for summary judgment, Mr. Rauh, and protective order.

MR. RAUH: May it please the Court, we have two motions for summary judgment pending, one on the local lodge and Systems Board expenditures for noncollective bargaining items, and one on the political expenditures rebate program to be put into effect on October 6, 1975. We have tried to isolate two areas where there are no factual differences and I have read the opposition to the motion for summary judgment and they have come up with no substantial factual differences and I'll show your Honor as I go along here, but there's a very significant point here in the opposition.

On pages 11 and 12 of the opposition, if your Honor has it there, you will see that exactly what I am trying to do is what Mr. Merrill does not want me to do. I'm trying to isolate so we can get some things decided so the trial is not going to be a gigantic and unwieldy matter.

Mr. Merrill is suggesting that there is something bad at the bottom of 11 and the top of 12 in trying to separate problems. He says it's a pointless aggravation to try to separate the problem. He says fragmenting those activities is bad. We are never going to do it, get this thing over, unless we do try to separate out items as to which a decision can be made. Otherwise, we're just going to have some kind of general hodgepodge at the trial that I think would be very time consuming. I think that

the two [8] motions I made will get this case down to manageable proportions: namely, what does the grand lodge spend its money on?

Turning first to the local lodges and Systems Board expenditures, on pages 3 and 4 of our Points and Authorities, we go into the facts as they are shown and sworn to out of the second supplementary answers to the Sixth Set of Interrogatories. Now, we show that it comes down to less than one-half of one percent. We show that it's a matter of, for the Systems Board, a penny and a third per month; for Local 3049, the big one, four and a half cents a month. The whole thing comes down to a very, very, very small amount. The whole thing comes down to far less than the Ninth Circuit called de minimis in Northern v. Nelson, 448 F.2d 1266 in 1971. That was an issue of denial of religious freedom to the Black Muslims, and seven copies of a newspaper were taken and it came to a value of a dollar O five, which is much more than a year's rebate here for the local lodges and Systems Board, and the Ninth Circuit said that's clearly de minimis.

Now, what do the plaintiffs say here in opposition to de minimis. They make one argument that the Seay case answers this and they quote from the Seay case on this point. What they overlook is what the machinists were trying to do in the Seay case--get out of the whole political expenditures problem. They were trying to say that the Supreme Court was wrong in Street and Allen and that the whole thing was de minimis. The Supreme Court decided that the political rebates were not de minimis. We're [9] not suggesting that we don't have to do some rebate here. We recognize that if your Honor's Paragraph 22 ruling is upheld, there will be substantial rebates from the grand lodge. It's something like fifty percent in '76 and thirty-five percent in the first half of '77, is what our figures show, but we don't challenge that there has to be a rebate. What we say is that in the grand lodge, in the local lodges, and the Systems Board, these are so small that they come within the Court of Appeals' decision of de minimis in the case I have cited.

Now, there's not a single fact in here that is controverted on the local lodges and Systems Board. There are three things they suggest. First, that we dealt with 1976. We actually dealt with 1976 and the first half of '77, which is the last thing for which there are figures. If we had taken an earlier year, they would have said, well, my goodness, you're choosy, so we chose the last figures, the best figures: '76 and the first half of '77 which are the last that are available. They are all in the record and we

said that we think your Honor can rely on this as typical. They made no showing why these years are anything atypical.

Secondly, they say in an affidavit by a research assistant in the National Right to Work Group that the figures are incomplete. That's not an answer, your Honor. You have to say where they are incomplete and in what respect. There isn't one figure given that in any way suggests they are incomplete. There is no [10] example of a mistake and, finally, they say as their third point on this affidavit that--

THE COURT: They say it's incomplete, inaccurate, and cannot be independently verified.

MR. RAUH: Well, yes, they can. They have got every single piece of paper we have. They have all of our records. They have got all our audits, your Honor. They have been through them, and yet they haven't come up with a single contradiction of what we did for '76 and '77 on the local lodge. They haven't come up with one, and they have all the papers. We are not--my God, the discovery has gone on in this case for five years. They have every paper we have got on how we spend our money, and yet their answer is that it's incomplete, and then they make one other point and this point I want to explain to your Honor because actually we have been, as I think we have generally been here in our figures, leaning over backwards. They say that we represent--that is, the three local lodges, the Systems Boards--some employers other than Western Airlines.

Now, I wish your Honor would turn, if I could persuade you, to the chart on page 3 of the second Points and Authorities. They were all put together, the Notice of Motion, Motions for Summary Judgment, Memorandum of Points and Authorities.

On the top of page 3 of the Points and Authorities on the local lodges and Systems Boards, there is a chart--

THE COURT: All right.

[11] MR. RAUH: Look, if your Honor please, what we have compared is something that works out in their favor. You will see in line 1: "Total dues income, WAL employees."

Then in line 2, you will see, "Paragraph 22 expenditures." In other words, we included the Paragraph 22 expenditures of these other employers, but we didn't include the income, so that the actual amount of expendditures on Paragraph 22 items is a smaller percentage. We did

this--I did it very deliberately--we did this to show that we're not spending money on Paragraph 22 expenditures for these other employers that isn't included here. Actually, if we put in the income from them, the figures would be lower than they are by the small amount. I think about five percent of the people involved are other employees, but it would be a smaller amount by something like five percent. Actually, when you have a local union meeting, if there's something social, the same people eat the same sandwiches and, therefore, we're including the expenditures under Paragraph 22 for these other employees but we're not including their income so, in fact, they are getting the advantage of a smaller figure, of a smaller figure that would be in effect if we had done both the income and the outgo, so what you have here on the local lodges and the Systems Board, it seems to me, if your Honor please, is that we have shown that the thing is de minimis. We have shown that there are no factual contradictions other than these three that I have explained: the other employers, the word "incomplete" and [12] the use of the '76 and the first half of '77, and we mos' respectfully request that the motion for summary judgment on the local lodges and Systems Board be granted.

Would your Honor like me to go on, or would you like to rule on this one?

THE COURT: Go ahead.

MR. RAUH: On the other one?

THE COURT: Yes.

MR. RAUH: Yes, sir.

On the political expenditures, your Honor, their primary argument here is a legal one again. First, on page 2 of their Opposition, they argue that the pending motion has already been heard. It has never been heard, if your Honor please. Anything that happened prior to our entry into the case was before this program was adopted. This program was adopted in October of '75. The motion for summary judgment that they were making at that time doesn't in any way apply to the implementation, the implementation that really matters.

They argue nonmembers cannot be compelled to participate in the rebate scheme. They can't be compelled, but we are giving them the money. We're giving everybody the money--the agency fee payers and

the members. How are they going to get money back unless they participate? We're willing to give it back, but we have to give it to someone and so we're giving it to them.

Now, they say that any rebate scheme is a violation of law. [13] This is on page 4. Any rebate scheme constitutes an unlawful prior restraint. That's page 4 of their document, their Opposition. If that's true, the Supreme Court doesn't know what it's talking about. In the Abood case on page 1802, there appears this statement: "Recognizing the difficulties posed by judicial administration of such a remedy, namely, on the political expenditures, the Court also suggested that it would be highly desirable for unions to adopt a 'voluntary plan by which the dissenters would be afforded an internal union remedy'."

That's quoting from Allen. Then going back to Abood: "This last suggestion is particularly relevant to the case at bar for the union has adopted such a plan since the commencement of this litigation. Footnote 41," and this is the Footnote 41: "Under the procedure adopted by the union, as explained in the appellee's brief, a dissenting employee may protest at the beginning of each school year the expenditure of any part of his agency shop fee for 'activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment.' The employee is then entitled to a pro rata refund of his service charge in accordance with the calculations of a portion of the total expenses for the specific purposes. The calculation is made in the first instance by the union, but it is subject to review by an impartial board."

It's exactly what we are doing. Indeed, it's a copy of what [14] we did in October. They did it much later while the thing was before the Supreme Court and the Supreme Court has clearly approved the idea of a rebate. What else could you do except to rebate, your Honor?

The plaintiffs put us in this dilemma. You have got to have a precise figure, and then they want you to have it ahead of time. Well, you can't have a precise figure on what you have spent before you spend it. Now, as far as we're concerned, you might very well try to guess at the figure. That would be easier for us than to have to do what we do, which is to sit down very carefully and to figure it out, so if any rebate scheme constitutes an unlawful prior restraint, it means you have to do it ahead of time, before you have the figures, and it means it can't be precise, which is exactly what they are demanding.

Then on page 6 they say: "Committing plaintiffs to a Union-administered rebate scheme violates elementary Constitutional rights." I know of no other way to do it except the way that we are doing.

On page 7: "BRAC's rebate plan subverts its burden of proof." On the contrary, we have put in all the facts on the rebate plan and have met it. We have shown exactly what is done. The affidavit which was attached to our motion for entry of final judgment specifically states how we got the figures, what the figures are, and, in fact, in addition, that it was the highest figure of any union in the country. It isn't on that I rely. It's [15] on the fact that we have done it carefully. They have shown no figures to the contrary, and that should be sufficient for a motion for a summary judgment.

On page 8 they then say: "Union rebate scheme contravenes limitations period of Labor-Management Reporting and Disclosure Act" because you don't get it for four months. Well, you can't get it until it's over, until the period is over, if you're going to figure how much it is, so then, finally, they make a very minor argument that we have not done it right. What they do is to quote a letter from a Mr. Ross fifteen months ago which, incidentally, is rather kind to us. It says at the end here on page 4 of the letter--it's the letter of October 25, '76--that Mr. Merrill, from a Mr. Ross who--it's Exhibit AA to the Meisinger affidavit--says, "Based on the data that was submitted on the RP Forms, BRAC's accounting data processing department did an adquate job tabulating the information."

THE COURT: Read the next sentence.

MR. RAUH: They say we didn't get it in, but they made no case for the fact we didn't get the material. We did everything humanly possible to get it in, and if there is any slightest chance to get the material in, we have done it, so what they are saying is that because a man wrote them a letter, not even a sworn affidavit--it's nothing but a letter fifteen months ago--that he didn't think we got it all in, he doesn't suggest we didn't make superhuman efforts to get it in, if the answer is that it has [16] to be perfect precision, then I don't believe you're ever going to have a program that meets those standards. We did go and we tried to get all the information in. We have done our best and of what we got in, we have tabulated them. I know of no other way that the thing could have been done other than the way we did it, and their fifteen-month-old letter that we didn't get all the information in I find erroneous.

You will notice, your Honor, that this is a million dollar program. We have over a million dollars in the political thing. Only a very few people ask for it back, but the amount of actual mistakes they found were one $66 and one $275, which wouldn't affect the procedures. What they found wouldn't affect the results at all, percentages.

Now, your Honor also asked me on the motion for protective order, I believe you wanted to hear that at the same time.

THE COURT: Go ahead.

I should say in that regard, when Mr. Bobo comes to this court, he will be answering questions like Mr. Merrill was asking him in his deposition, and I assume he'll be here at the trial.

MR. RAUH: He's on our witness list, yes, your Honor, on our pretrial memorandum.

On July 25th we were before your Honor on our motion to terminate discovery, or in the alternative, to vacate the interlocutory summary judgment. At the conclusion of my argument, your Honor granted the motion for terminating discovery. Then [17] Mr. Merrill asked if he could have some discovery not related to the waste issue and your Honor said, "Yes, I'm terminating discovery only on the waste issue." Then you said, "But I think the rest of it is practically finished."

Then Mr. Merrill answers, "Well, sir, we have some discovery of their accountants and their comptrollers to ascertain what the records will and won't show. We have discovery as to exactly what was taking place because, as the Court knows, their record keeping in the past did not reflect activities undertaken, so we need some personal inquiries on those points."

On that basis we went forward six months ago after your Honor had indicated that the thing was practically finished and this is what happened since then.

We have had a Sixth Request for Interrogatories, Seventh Request to Produce, all of which has been given. Then we were before your Honor here on the 19th on a motion for entry of final judgment, which was denied. The day before that 19th hearing, plaintiffs sent out a Notice of Deposition of eight more depositions. On that basis they asked--this is on

November 19th--for more time. Although they didn't mention the depositions, they mentioned office sickness and asked for more time for the pretrial hearing. Your Honor turned to me and asked me where I stood on that and I answered your Honor saying we were ready for pretrial, and that they were only doing this to try to get more time for more depositions six months after your Honor had said discovery was [18] practically finished and your Honor ruled, "We'll leave the pretrial date as it is."

Now, despite the pretrial date being left as it was, Mr. Merrill went ahead with those eight and added four more four days later. At the very time he should have been preparing the pretrial, he tried to go ahead with twelve depositions. We did not ask for a protective order on any of the twelve. We went ahead. They took one deposition from each of the local lodges, two from the Systems Board, and the president of the union.

There's only one person there that this motion for protective order involves. When we get to the pretrial conference, I have another proposal, but while Mr. Merrill was violating the pretrial rules by not calling a meeting, by not filing his pretrial statement, by not filing the pretrial order, by filing an inadequate pretrial statement two weeks later, we went ahead with all these depositions. Well, with the exception of the one here which is the one involving a man named Jack Reese. This deposition was noticed, after your Honor had refused additional time on the pretrial, for Salt Lake City on a Saturday. We thought that was a very difficult thing to harass us with, to go to Salt Lake City on a Saturday when there were going to be some depositions in Chicago.

We told Mr. Merrill that we were going to have it in Chicago and we would bring Mr. Reese there, and this is what Mr. Merrill said. I'll quote Mr. Hirsh, and then Mr. Merrill. Mr. Hirsh [19] said Mr. Merrill said since we, defendants' counsel, were giving him a hard time refusing to postpone the pretrial, he, Mr. Merrill, was going to give us a hard time, and if it would cost us more in Salt Lake City, that was fine.

Mr. Merrill then answered Mr. Hirsh and I put this on the record--this is what he said: "Sol, Rauh is giving me a hard time for no particular reason and we do have to work together on this thing for a lot of years yet. I am not inclined to accommodate your convenience when there is no courtesy or consideration being shown for mine, and, therefore, I would just as soon take the deposition at Salt Lake City even if it's more convenient or cheaper for you to take it in Chicago."

Now, we couldn't believe he would persist in that, and we brought the witness to Chicago to take the deposition. I think maybe this was a Freudian slip by Mr. Merrill when he said, "We're going to be together a lot of years yet." I though your Honor in July was trying to get the discovery over when you said it was practically finished. Then we turn around and after your Honor sets the pretrial way back in October for today, and then it was tried to be changed in December 19th and your Honor overruled that. Then instead of complying with the pretrial, we went ahead with depositions. We are now told that now he wants to go ahead with Mr. Reese whom we brought all the way to Chicago, and I most respectfully request that that motion for a protective order be granted.

[20] I also hope that at the opening of the pretrial, I can make a statement about how we can get ahead with that.

Thank you, your Honor.

THE COURT: Mr. Merrill?

MR. MERRILL: I would first like to present Mr. Hugh Reilly to the Court. He is with me here today. He's been associated as counsel in this case for some time. This is his first occasion out here.

Let me address briefly, if I may, some of the points that Mr. Rauh raised. They have been treated so often in papers submitted to this Court and in arguments submitted to this Court that I shall do my best to refrain from burdensome repetition of those things.

Mr. Rauh pointedly avoided his usual statements about union good faith and that, of course, is one of the integral elements that even the Reed court which the Ninth Circuit has twice taken issue with found as as a prerequisite for a union rebate plan. Now, in good faith in this case, we have noncompliance, purposeful noncompliance, with Street and with Allen for year after year after year. They don't acknowledge the protests from our people. They are carefully written and sent by certified mail. The reason they don't acknowledge those, and the reason that they don't take any steps to record their political expenditures is because there are so few plaintiffs.

They then enact three admittedly deficient dues reduction or dues rebate schemes. They come here to you today asking you to take [21] on

faith their own statements as to the accuracy and the completeness of their accounting records. They retain Haskins & Sells, a widely respected accounting firm, to do auditing work for them. They have financial resources that are extremely impressive. Mr. Kroll testified two weeks ago that he expects to show a million dollars in the black this year. Where is even the most humble disinterested witness to say that their efforts, (a are reasonably accurate; (b) are made in good faith; (c) comply with anyone's accounting standards? We have none of that. We have admitted guesstimates. At best, they are guesstimates. We have guesstimates for 1976 that are supposed to be accurate for 1971 and for 1986.

Now, in that regard, we do have some developments. In my hand is a brochure issued by BRAC called PEP. It's the word for BRAC in '77, and this comes from Mr. Fred Kroll, the International President, and in that he says: "In this Union, we have got a big job to do this year."

His first point is to win updating legislation. The second one is to "build our political and legislative muscle for this year, for election year 1978, and for the future."

He describes the PEP program. He says it stands for BRAC's political education program. "We're asking local lodges and Systems Boards to help finance PEP by donations from their treasuries because the needs are greater than the grand lodge can budget by itself."

[22] Inside he talks about the railway clerks political league and he says, "It is part and parcel of BRAC."

On the next inside page, he talks about the job ahead for the union and that includes, "running week in, week out, legislative drives for the bills we need."

On the final page, he says, "Local lodges and Systems Boards will want to give ample donations from their treasuries."

Now, does that sound like stable expenditures, or does that sound like increasing the political expenditures from local lodges and from Systems Boards and probably from the grand lodge, none of which is contemplated by Mr. Rauh's presentation today.

We have gone to a good deal of expense and trouble to hire two certified public accountants and expose them to the voluminous records that

BRAC maintains, and they are in agreement. They say you cannot compute accurately BRAC's political expenditures. In that, their opinion is joined by Russell Wende, BRAC's own independent chief auditor. They say you can't compute BRAC's collective bargaining expenses given their present system. Mr. Wende joins them again.

Again, speaking of good faith, when I deposed one of the grand lodge trustees and asked him how they arrived at these political expenditures figures for 1974, I said, "Mr. Schrader, did you look at the records of the grand lodge legislative fund?" and he said, "No, we didn't." Didn't even look at them. Now, if that's a good-faith effort to compute political expenditures when **[23]** this Court had specifically included legislative activities within the scope of nonchargeable political costs, then I'm badly mistaken.

Again, on bad faith and again on recent evidence, Mr. Kroll in his deposition two weeks ago, one of the very few questions he was able to answer, finally was forced to admit as the papers submitted to this Court show, that not all of the time spent on the PEP program is going to be rebatable. That is a blatant rejection of Mr. Rauh's assertions and of the rulings of this Court.

Now, with regard to the rebate program functioning, Mr. Kroll was not allowed to answer questions as to how employees are supposed to wend their way through the thicket of the rebate appeals. Can they be represented by counsel? A seemingly innocuous and irrelevant question. He was not permitted to answer that.

Mr. Rauh says that we want perfect precision. We are not demanding perfect precision, but the Supreme Court in Allen had some measurable accounting standard in mind. They said absolute precision is not to be required. Obviously something less than absolute precision would be acceptable, but they didn't say that a guess is acceptable. I don't see how they could when they're talking about important rights at that point in time that now have been designated as clearcut First Amendment rights. How can a guess in the scope of someone's First Amendment right comport with all of the rules of law and cases that we have had in the Supreme Court?

If BRAC wants to set up a good-faith accounting scheme that **[24]** will, with reasonable accuracy, comport with accounting standards and project the collective bargaining expenditures, they can do it; I have no

doubt. They don't wish to.

There are many more complicated accounting problems in this world, I'm sure, than doing that, and I'll give you an example of where that is done regularly. In Hawaii, the Hawaii Public Relations, Public Employees Relations Board, computes every year the amount tht the teachers union, for example, spends on collective bargaining, and that is the amount that determines the agency fee. It's not an insuperable task; it can be done.

Mr. Rauh would have you believe that the Supreme Court has wholeheartedly and enthusiastically embraced any rebate scheme that a union may care to create. It's plainly not true. He didn't finish reading the Abood quote when they specifically and pointedly said, "We do not determine the constitutional sufficiency of any such plan." And I don't see how you can possibly square the clearcut delineation of constitutional rights with a rebate scheme that requires someone to surrender those rights for a period of a year or as long as four years. There isn't any doubt in my mind as to why Abood did speak wistfully of union rebate schemes. These litigations are tedious, as this Court knows far better than I, and the Supreme Court, having Street and Allen before it, surely knew that, so they were looking towards some measure that would satisfy a lot of complaints and perhaps this union rebate scheme will satisfy a lot of complaints, **[25]** but that does not mean that those plaintiffs who are dissatisfied with the union's calculations and insistent upon a judicial determination of their rights, cannot have that judicial determination.

I saw recently in the Wall Street Journal that the Ford Motor Company, in an attempt to resolve customer complaints in North Carolina, has established a citizen board to hear those complaints and try to determine them. Does that mean that if you buy a lemon from Ford in North Carolina that the doors of the courthouse are closed to you? I don't think so.

We are talking about rights that are much more important than defective cars here, and we do have good guidance in the cases. The Marine and Shipbuilding Workers Union tried to keep their own members from expressing complaints to the National Labor Relations Board about internal union doings, and the Supreme Court said that is intolerable. The question of being fined for exercising your statutory rights is not one the union can keep to itself. It's one that is in the public domain, one that must be presented to a governmental agency, and in this case, there is no

administrative agency to determine constitutional rights. They cannot close the doors of this courthouse to our plaintiffs.

From a procedural standpoint, which I think is the far less important basis to reject the motions for summary judgment, they simply don't meet the standard of conclusive proof that is their obligation if they wish to prevail on the motion [26] for summary judgment. We have at minimum sharply contested issues of fact here as to Mr. Ross' affidavit and the affidavit of Susan Meisinger. They say they have calculated political expenses and other noncollective bargaining expenses, but we have deposition testimony that they have not. There are no indirect local expenses connected with politics in those rebates. There is no accounting for the organizing costs of the Systems Board. We elicited testimony two weeks ago from Caroline Seel, General Secretary-Treasurer of that body, which says that their organizing costs are not entirely reimbursed, but we do not find those in the defendant's calculations.

Now, unless the Court has a question at this point, I'll speak briefly to Mr. Rauh's motion for protective order with regard to the deposition of Mr. Reese.

THE COURT: Go ahead.

MR. MERRILL: That deposition was originally noticed in Salt Lake City because that is where Mr. Reese lives and works. I was not able to take it in Chicago because of the time pressures involved in preparing our pretrial statement which was admittedly late and for which I apologize. I do submit that our pretrial memorandum is a much more comprehensive effort to outline the scope of things stated in the local rules than that proffered by Mr. Rauh. In any event, I was unable to depose Mr. Reese in Chicago and I told Mr. Rauh's associate so the day before on two occasions and left no doubt whatever that I would not under [27] any circumstances depose Mr. Reese in Chicago that week. Prior thereto, I had spoken with Mr. Hirsh about taking Mr. Reese's deposition in Los Angeles last Friday along with another deposition to be taken. Mr. Hirsh raised no objection during that discussion. I noticed the deposition for Los Angeles at the date and time and place discussed with Mr. Hirsh. Now, they brought Mr. Reese to Chicago either to make me look bad, which I think was a highly unsuccessful attempt, or for other business reasons, and I just can't see any ground whatever for precluding me from obtaining Mr. Reese's testimony.

Now, I asked Ernie Mogg, who is the General Chairman of the Systems Board, which was Mr. Reese's old job, if he was able to compute the amount of time that Mr. Reese spent on collective bargaining and I asked this question on page 114 of the Mogg deposition:

"So, if you were to try and arrive at a figure of the amount of his time . . ."--referring to Mr. Reese--"he spent on things other than bargaining activities with Western Airlines, it would be a guess, wouldn't it?"

Answer: "That's right. Like I say, I knew most of the time when he was traveling and what for."

If the Court feels we're entitled to attempt to accurately determine whether or not they can account for their noncollective bargaining expenditures, I submit that that is the most relevant question that could be asked and, obviously, it has to be asked **[28]** of Mr. Reese because Mr. Mogg doesn't know and no one else knows because they don't maintain the time records or other records that comprehensively detail the way in which the salaried officers spend their time.

The Reese deposition and other depositions, I think, should be resumed under conditions to be controlled by the Court, and we can discuss that in conjunction with the pretrial matters.

THE COURT: I think the time has come to stop all further discovery, Mr. Merrill.

MR. MERRILL: Well, your Honor, I would only submit that the Court may be getting a little bit ahead of the record. We have deposition transcripts that are en route to us and I think that if the Court had the benefit of seeing the type of questions we were foreclosed from asking, foreclosed from getting a response to, you'd feel differently.

THE COURT: I think we'll end the discovery. It's been five years now and I think that's long enough.

MR. RAUH: May I have just one minute on one of the earlier points, sir?

THE COURT: Yes.

MR. RAUH: The PEP document, if your Honor please, is in '77. Every dime of the PEP money will be rebated in '78 when we now get to it. In fact, they have all been ordered to put in the PEP material.

Secondly, with reference to Mr. Wende, the thing he testified **[29]** to that was told you was that in December 17th, 1974, the whole year before the program we're now asking your Honor to validate. I guess to call it a guess simply means that no one has looked at the reports of the board of trustees. They are attached. Both of their reports for '75 that was done in '76 and the '76 that was done in '77. Both of those reports are in there. They are full and exhaustive studies and we really believe to call those a guess is ludicrous. What is happening here is that we are trying to isolate some of the problems so we can go forward, and we respectfully request that both of the motions for summary judgment be granted.

THE COURT: I don't think I can grant them, Mr. Rauh. The motions for summary judgments are both denied.

The protective order motion is granted.

MR. RAUH: I take it, it's a general protective order now against all further discovery?

THE COURT: That's right.

MR. MERRILL: Your Honor, may I mention just one point in that regard?

THE COURT: Yes.

MR. MERRILL: In our pretrial statement we need to establish damagesas to some of those persons who have either had interrupted service or terminated service with Western. Some may have come back and I would have proposed that we send them an interrogatory to elicit the actual amount of dues that would have been reflected **[30]** by that interrupted or terminated service. I think that's the easiest way to establish precise dollars that each plaintiff would be entitled to.

THE COURT: No, I think we can establish that through your own plaintiffs.

MR. MERRILL: Your Honor, some of these people are as far away as Alaska and Hawaii.

THE COURT: You know where they are, however. I don't think so.

Under our rules, you gentlemen are supposed to get together and present me with a pretrial order. Now, I know, from listening to both of you many times, that you are not going to agree at all on what the issues are, but that doesn't change the situation that you are supposed to present the Court with an order, and I have been through this before in other cases. What you have set out, plaintiff claims these are issues; defendant denies that they are, or defendant claims these are issues and plaintiff denies they are, but they should all be set out.

I'll listen to you again at 2:30 about the pretrial order.

MR. RAUH: Thank you, your Honor.

(Noon recess.)

[31] SAN DIEGO, CALIFORNIA, MONDAY, JANUARY 16, 1978, AT 2:30 P.M.

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THE COURT: All right, Mr. Rauh, what do you have to say about pretrial?

MR. RAUH: May it please the Court, this morning when your Honor referred to locking up counsel--

THE COURT: It wasn't completely in jest either, Mr. Rauh.

MR. RAUH: I wouldn't waste your time--

THE COURT: I'd assign a marshal to keep any peace between you.

MR. RAUH: When your Honor said that, I didn't think your Honor was trying to be unfair. I think your Honor was unfair in the sense that I think you kind of had the attitude of the failure here as a plague on both your houses, that you're both wrong. I want to make clear to your Honor that we have tried to do our best to comply with the rules. The noncompliance was on the other side. The noncompliance lay in a two week late pretrial memo. They never requested until after the court this morning for a meeting which I couldn't do at noontime, but which we are ready to do this afternoon--not a draft order--a first statement that

they were going to give a unilateral order and making an inadequate pretrial memo. I think it's a little unfair and I don't say your Honor meant it to be unfair because your Honor may be under the impression that we, too, may be at fault, but I would like your Honor to know, and I want the record to show that I feel I have done a conscientious **[32]** job of trying to comply with the rules, especially rules that are somewhat difficult and new for me, but despite that, I think I know Rule 9 pretty well by heart by now.

Now, the question is, "So what?" and I think that would be a pretty good question for your Honor to ask me: So what? I have looked at Rule (g)(2) and it provides for a dismissal when compliance with the rules for pretrial have not been adequate. I think it would be silly for me to get in front of your Honor and say I want a five year old case dismissed because they didn't comply with the pretrial, and I'm not going to do that. I do feel, however, that we're entitled to make a proposal based on the fact that we have been sinned against and are not the sinner in this regard.

I suggest that we treat this as a first pretrial under Rule 9(g)(5). Rule 9(g)(5) says: Where the case is complicated or may be protracted, the Court may use the first pretrial hearing as a preliminary pretrial conference to lay out a program of future and additional pretrial meeting or meetings.

My feeling would be this: I think we could make some progress this afternoon on issues. For example, Mr. Merrill has re-raised a number of issues that I think your Honor has decided against him. I think we could put that to rest. I think the problem of the burden of proof might well be set to rest. We have made a request for a stipulation which we would pay the full grand lodge dues for the first five years--for the earlier years before '76 and **[33]** '77. There are some problems about the witnesses, so that I would suggest that we go ahead as a pre, pretrial to try to make as much progress as we can. Then, it seems to me, since the burden of going forward is on plaintiffs' counsel and since he didn't accept it, plaintiffs' counsel be directed to draft an order as best he can, based on the decisions your Honor makes this afternoon on the various points we could discuss, and maybe Mr. Merrill has issues that he wants to raise, and that he be directed to send us the pretrial as he drafts it and if there is not agreement, then the conference we would hold of nonagreement be held in Washington because of his failure to comply with the rules.

I find this a very minor sanction for which I'm asking in view of the fact that the national headquarters of the National Right to Work Organization and Mr. Reilly's place of business is in Washington, or Alexandria across the river, so I don't think I'm asking something too drastic in suggesting we go ahead as a pre, pretrial in an effort to get on with the trial.

THE COURT: Yes, I'd sure like to do that.

MR. RAUH: And I'm ready whenever you are to bring up some issues, but I thought maybe you'd want to hear Mr. Merrill on my suggestion.

THE COURT: Yes.

MR. MERRILL: I think the suggestion is sensible, your Honor, and--

[34] THE COURT: That's the first time you have agreed with Mr. Rauh about anything in this case, isn't it, Mr. Merrill?

MR. MERRILL: Well, I certainly don't agree with the preliminary remarks, and I could beleaguer him as he beleaguered me with comments of noncompliance of various things. His proposed pretrial order would be a joy for me to stand as is because it lists no witnesses and no exhibits, proffers no proof whatever as to the Systems Board and local lodges, and I would love to have that duck already in the bag instead of having to go out and sit in the fields and shoot it. But I recognize that he was a little over-confident in anticipating his motions for summary judgment having been granted, and on this occasion, as on previous occasions, we are seeking a decision from this Court based upon comprehensive facts, not upon defaulted facts or assumed facts, and issues foreclosed because of procedural mistakes on the part of counsel, whichever side might have made those mistakes, so I'll join with him in that request, and I would hope that we can move expeditiously through it. A case of this bulk--

THE COURT: I suggest at first that you two do confer and, actually, the jury room is a convenient place for that conference and I'll be available all afternoon. When you think you have reached a complete impasse, we'll come back into open court and if we can't get things ironed out satisfactorily today, I might look with favor upon Mr. Rauh's request. I have to be in Washington [35] on February 2 and 3, and it's presently anticipated at least that my committee meeting should be over

by noon on Friday, the 3d, so that I could have a hearing back there on the afternoon of the 3d. That may get fouled up because the chairman of my committee has a fifty percent chance of being named the director of the FBI. That may make me the chairman of that committee and that might make it more difficult but at this time I see no obstacle to that.

MR. RAUH: Is that Judge Webster?

THE COURT: Yes.

MR. MERRILL: I appreciate your Honor's willingness to go to those lengths. I don't think that will be necessary. I think we should be able to reach an agreement on what we disagree on this afternoon.

THE COURT: I would think so, too.

MR. RAUH: May we come back--

Let me give an example of where I think there is a disagreement.

THE COURT: All right.

MR. RAUH: If you will look on Mr. Merrill's pretrial memorandum of contentions--

THE COURT: I don't have that in front of me.

MR. RAUH: --of fact and law.

THE COURT: Go ahead.

MR. RAUH: On page 10, Mr. Merrill suggests the waste issue **[36]** is still in the case. I think your Honor ruled that out.

THE COURT: I think I ruled that out.

MR. RAUH: On page 13, Mr. Merrill suggested the benefit issue--that we have to prove benefit of the collective bargaining--was ruled out by your Honor and I believe you have ruled that out.

THE COURT: I think I have ruled that out, but I think I have also ruled that you have the burden of proof.

MR. RAUH: Yes, your Honor, you have ruled that. I'd like to clarify that, too. We may solve everything in the next few minutes. I'd like to clarify the burden of proof. You said flatly that I had the burden of proof on the Street and Allen expenses.

THE COURT: Right.

MR. RAUH: On the political expenditures, and I agree with that.

THE COURT: I think you have the burden of proof to show collective bargaining expenses.

MR. RAUH: All right, your Honor. I accept that, so there's no argument on that point. The burden of proof is settled. It's one of the items I said--

The benefit and waste issues are settled.

The other one I thought that was settled, your Honor, was that this case was an expenditure on the administration of the collective bargaining agreement because if you will recall--

I'll get the document.

[37] THE COURT: All right.

MR. RAUH: --on October 31st we were arguing the plaintiffs' motion to compel discovery and one of the interrogatories had demanded, had requested information as to our expenditures on this case and in your order, you granted the motion to compel in Interrogatories 1 and 2 about collective bargaining expenses, and you denied the motion to compel on the basis of the question dealing with the cost of this case after I had argued that nothing could be clearer on the administration of the collective bargaining agreement than to decide what the collective bargaining agreement meant in relation to refunds that would go to members and agency fee payers, and you then denied the rest of the motion to compel, including the motion to compel on that item, so I thought that item, too, was out of the case: namely, the cost of this suit.

THE COURT: I think it is.

MR. RAUH: I don't think we have any problems. I would think the order now is pretty clearly draftable.

May I ask this question because I'm not familiar with your procedure. Mr. Merrill put in his exhibits in the order, and we'll put our exhibits, and I think the order may not be by consent, but may I ask this: In the procedure here, at what stage--I have two questions; I'm sorry. It might be helpful and it may solve everything--at what stage does one raise the question about exhibits? During a pretrial or does one have to wait until the actual offering?

[38] THE COURT: You mean, as to admissibility of them?

MR. RAUH: Yes, your Honor.

THE COURT: No. Our practice is that when you list them, you list your objections to them, or the sides list their objections to them.

MR. RAUH: To the other side's one.

THE COURT: That's right.

MR. RAUH: But that would not be decided until they were offered at the trial.

THE COURT: That's right.

MR. RAUH: Thank you.

THE COURT: That's to give me a chance to take a look at them in advance and get some preliminary feel about them.

MR. RAUH: The only other question that I have--

THE COURT: And, hopefully, you will, of course, stipulate to foundation as to almost all of them.

MR. RAUH: Oh, yes, I wasn't thinking of objections on the grounds of foundation or that they weren't what they purported to be. I was thinking only of relevance and that would come at the trial after you have stated your ground for irrelevance and pretrial.

THE COURT: That's right.

MR. RAUH: The only other question I have is the witnesses. While all the witnesses are not stated in their pretrial memorandum, there are some witnesses stated, and especially the attorneys on [39] page 35. There's a list of witnesses and it lists all of our attorneys and lists Mr. Merrill. Where one has a question of the relevancy or propriety, should that await the trial, too, sir, or is your practice to try to straighten out ahead of time. I find this rather unlikely to view myself as a witness, and I find it also unlikely that Mr. Merrill can be both counsel and witness, but I didn't know whether this is the proper time to raise that. I'm only asking that because I honestly don't know what your practice is. Back home we could raise that point at the pretrial stage.

THE COURT: I'd be happy to have it raised at the pretrial stage.

MR. RAUH: Maybe Mr. Merrill will explain that.

As far as the issues are concerned, I think they are now clear, and I don't think we are going to have any trouble with that.

On the exhibits we have no trouble because we simply state ours and maybe Mr. Merrill would straighten that out and then there's nothing that I have to raise at this stage.

THE COURT: All right.

MR. MERRILL: I must say we are making astounding progress, your Honor.

THE COURT: We are. I am astounded.

MR. MERRILL: Very pleasing progress here, and I'm taking some hard lumps that's not too pleasing on these issues; I have [40] to confess that and I'm not going to debate the points any further.

On the scope of the chargeable costs, Mr. Rauh did not raise that as an issue. It seems to me that the union sometimes is in agreement with us and sometimes they take a different position. That is to say, they urge Paragraph 22 as the rebatable amounts sometimes, the nonchargeable amount, and then sometimes they say only Western Airlines collective bargaining is the chargeable amount, and there is a vast difference

between those two that I think was clearly articulated in this Court's order of November 29, 1976. It would certainly reduce the documentary proof and the expert accounting testimony considerably if we had absolutely clear that only Western Airlines collective bargaining expense is the chargeable portion. Collective bargaining with other employers and with other employee units is not to be charged to the plaintiffs. Now, that's my understanding.

THE COURT: That's my understanding of my own order.

MR. RAUH: Do you want me to wait, because I wanted to raise a clarification.

THE COURT: Yes.

MR. MERRILL: Mr. Rauh has conceded at several points in his papers and in his arguments that the Policy Statement rebate scheme was deficient. At one point he says it was bad, and at another point he says it was so bad that's why we adopted this new communication rebate, and I think in light of the fact that that [41] was inflicted upon plaintiffs, that it is equally subject to adjudication as were the previous rebates as a breach of the duty of fair representation. We may not get much in the way of relief at this point out of that, but it was a calculated act on the part of the union that was not in accordance with their duty of fair representation and we would ask at minimum declaratory relief to that effect.

THE COURT: As to that original rebate.

MR. MERRILL: As to the Policy Statement of 1974 that President C. L. Dennis issued as a policy statement. You then ruled it was improper. They then enacted it as a constitutional amendment.

THE COURT: But then they changed it when Mr. Rauh got in.

MR.MERRILL: Yes, sir.

MR. RAUH: I think you have already given the declaratory relief, sir.

THE COURT: I think I have, too. I have declared that that was an invalid policy statement.

MR. MERRILL: I can't recall a specific order ruling to that effect. Your summary judgment referred to the fact that it had been adopted but there's no dispositive position relating to it.

THE COURT: You can put one in this pretrial order because it's been covered.

MR. RAUH: It's paragraph 8 of your order, your Honor: "BRAC has further breached its duty of fair representation to **[42]** plaintiffs by the following" and then subitem: "Failing to make dues reductions of three and a third percent excluding agency payers such as Ellis," and if you want to add to that, it's all right with me.

THE COURT: I think it's pretty plain.

MR. MERRILL: Now, sir, we have the question of injunctive relief regarding the payment of strike benefits or the entitlement of agency fee payers to receive strike benefits and, whereas Mr. Rauh has repeatedly assured the Court that they are fully entitled to receive those payments--

THE COURT: He has made that statement in court, without walking the picket line.

MR. MERRILL: Yes, sir, and then seven months thereafter, General Chairman Ernie Mogg, Systems Board, told a local lodge meeting, "You don't get strike benefits unless you walk a picket line." That's in the minutes of a meeting, and we have provided the exerpt of those minutes in our pretrial statement, and we fully intend to offer the minutes themselves.

MR. Rauh earlier said he was not against formalizing this statement that he made about entitlement to strike benefits.

THE COURT: That ought to be formalized in the pretrial order.

MR. MERRILL: We would ask that the Court adjudicate the spending of political and ideological activities as constitutional violations in accordance with Abood. At the present time, **[43]** the sole basis of the Court's holding that those monies were misspent is the breach of the duty of fair representation. I think Abood makes it plain that to the extent there are political and ideological expenditures, it's a First Amendment violation.

THE COURT: I'm not going to make that in the pretrial order.

MR. MERRILL: All right.

THE COURT: I feel much more comfortable--despite Abood, I feel much more comfortable on a statutory basis.

MR. MERRILL: The attorneys' fees issue remains open as to attorneys' fees that may be awardable to plaintiffs. Mr. Rauh opposed those on the grounds of Alyeska and the fact that we couldn't recover them until some appellate process had taken place in this case. We have responded to those in our memorandum and if the Court can give us an indication on tht issue, it will affect the submission of a very substantial amount of proof.

THE COURT: I don't think that I'm going to give attorneys' fees.

MR. MERRILL: Would it be appropriate to inquire of the basis of the Court's inclination on that point?

THE COURT: The language in Alyeska.

MR. MERRILL: On those matters which the Court has ruled out, including that one, what we would propose doing to diminish the burden of trial is to prepare a proffer as we did on the compulsory union membership issue and just submit those into the **[44]** record if that's satisfactory.

THE COURT: That's fine with the Court.

MR. MERRILL: The only remaining issue on my list here is the nature of the relief to be granted, and I don't know that there's really anything that can be resolved in terms of discussions between Mr. Rauh and me and/or respective counsel with the Court. We, of course, feel that full disclosure of all past amounts is appropriate as they cannot and will not be able to establish the amount of misspent monies.

As to the future, we would urge that a temporary injunction be filed which would not foreclose them from collecting collective bargaining monies as soon as they are able to establish the amount that is being spent in accordance with the statute. The money is theirs but the balance is no longer taken out of these plaintiffs' pockets.

THE COURT: I think that decision has got to await the trial, Mr. Merrill.

MR. MERRILL: There are a couple of small points I'd like to clean up as omissions from the pretrial statement which I probably could do in the subsequent submission, but I'll mention them just now.

Our Contention of Fact No. 3 refers to the plaintiffs having begun paying fifteen dollars per month in July 1975. It should read June.

Among our witnesses, we won't have those witnesses now because [45] the Court has ruled that issue out.

We'll have to have someone attest to the amounts of monies paid by these plaintiffs to the defendants over the course of these years. Now, I think tht it's really appropriate for the defendants to establish that given the fact that they have admitted misspending a lot of these monies and they have the records available to them on computer. They can spew them out at a moment's notice. I'm quite sure the Court does not want us to bring in 180 plaintiffs and take your time to say, "Yes, I am a plaintiff. I worked for Western Airlines. I paid this amount of money. I was laid off during this period of time. I went back to work for the union and I paid this amount of dues."

THE COURT: I think I might retract one statement from this morning. I think you can make a request for admission as far as those are concerned.

MR. MERRILL: Unfortunately, I don't have the basis--

THE COURT: You should have all those figures now.

MR. MERRILL: I don't have the facts. I don't know when a given class member may have been laid off. I would think the defendant--

THE COURT: Do you have those on computer tapes?

MR. HIRSH: Your Honor, we have computerized the data, I think, since July of 1975. That's when the new accounting system with the tapes and all went into evidence. For the periods prior to that, we would have to go back to the records but I believe, [46] without having seen them with my own eyes, I believe the per cap tax reports that the local lodges

sent in quarterly to the grand lodge should indicate the amount of dues paid by all the individual members. The only question in my mind is, we have to reach some agreement on exactly who's in this case. We have never fully identified all the people, I think. We have never gotten a list from Mr. Merrill. We have a list of people we have been sending refunds to under our rebate plan, but we don't know if Mr. Merrill agrees that that includes everybody who he believes is in the class.

THE COURT: Certainly you have a list of your class members.

MR. MERRILL: That was set forth in the table of proof of plaintiffs' objections attached to our motion for summary judgment and it identified in that table the source whereby we established that they did register a protest, so there isn't any doubt, if Mr. Hirsh will refer back to that document, as to who we contend is in the class.

THE COURT: That's what I thought. I remember seeing that.

MR. HIRSH: Well, with the list of names, I would certainly make every effort to check our records to see if we can determine when any individual was in layoff status and was not a full dues-paying member.

MR. MERRILL: If we can't get the entirety of the information from them, we may be able to go to Western Airlines and get documentation from them so we'll leave that as one possibility--calling **[47]** a witness from Western.

THE COURT: All right.

MR. MERRILL: The last point is one that was just raised over the weekend by Howard Ellis. He was talking with the husband of a lady who was a class member and who opted out, according to the communication that your clerk sent me, and apparently she misunderstood the notice and did not wish to opt out. She thinks she's still a participant in the case. We are perfectly willing to continue representing her as a class member and to correspond--

THE COURT: She'd better send some correspondence to the Court to that effect then.

MR. MERRILL: Does your Honor desire that I send her a letter, a copy to the Court and copy to Mr. Rauh, advising her of this?

THE COURT: Yes.

Now, what do you expect to get from Mr. Rauh as a witness?

MR. MERRILL: Well, your Honor, that's an interesting question. I'm happy to answer it.

I asked Mr. Kroll, the International President of this union, which indirect expenses were taken into account and how were they taken into account, in calculating these rebates, and Mr. Rauh would not let him answer because he said that only an attorney could answer that question, he being the attorney. Now, if Mr. Rauh is calculating the rebates, I want Mr. Rauh on that witness **[48]** stand.

Mr. Klevens wrote the Board of Trustees report for the 1974 dues rebate. He took the report that the trustees prepared and they trash-canned that one, and then they used his, so I want him as a witness. And Mr. Hirsh obviously was either a participant in, or gave approval for that communication rebate and I want to know what his role in that was.

These gentlemen have served their clients, but they have served them in ways other than representational ways and I think that those are solid examples of the possession of relevant information from them and we expect to go into that.

The other attorneys listed, of course, were listed with regard to the amount of time they'd spent in working on the case, or to be listed or to serve as independent witnesses as to the value of that time.

THE COURT: I think in the trial, the International President will be answering those questions that Mr. Rauh wouldn't let him answer in his deposition, so that you won't need Mr. Rauh.

MR. MERRILL: Well, to the extent--

THE COURT: He will be either answering them or the marshal will be taking him with him.

MR. MERRILL: To the extent that he may prove unable to answer those questions, we'll reserve our right to call defendants' counsel.

THE COURT: Then there will be a failure of proof on their [49] part, isn't there? You'll be in a better position than if Mr. Rauh testifies.

MR. MERRILL: Frankly, I could use a little improvement in my position, having seen the way the issues have fallen here.

Your Honor, I think that disposes of those things that would have been included within the pretrial order. I would be more than nappy to take the transcript and summarize your Honor's rulings on those and prepare a formal document and submit that to Mr. Rauh.

THE COURT: Fine.

MR. RAUH: I did have one or two points, sir, although progress is so great, I don't want to upset it.

When I rose and asked if I should speak then or wait, it was in regard to this problem of exactly what this Paragraph 22 means. I suppose that will have to wait until it's fleshed out at the trial but--

THE COURT: I'm afraid so.

MR. RAUH: --but there is this point: I believe that the disagreement is explainable and it's explainable this way: Mr. Merrill and I think your Honor has stated--that the proposition is that the only thing we can charge a protester is the Western Airlines collective bargaining. I accept that.

THE COURT: Right.

MR. RAUH: Where the issue arises is the degree to which headquarters costs available are Western Airlines collective [50] bargaining. In other words, I made the comment--I think it was the second time previous, the penultimate time I was here; I think it's October--I made the point--or maybe it was the last time in December--I made the point that an army spends so much out in the field, but that you couldn't just say that's the cost of the army. You have to say a certain amount of headquarters, and I think that is where the difference is, but it's a problem that seems to me that can await the trial to see how much I can show that the headquarters cost is properly allocable to Western Airlines.

THE COURT: I think that's true and my present inclination, Mr. Rauh, is that perhaps the only reasonable method of doing that is showing what headquarters does and then just take it as an arbitrary percentage, the Western Airlines dues, as a percentage of the entire dues.

MR. RAUH: I think that is what we were struggling towards in our last answers. I don't say we made it perfect, but I think that is what we are trying to do, and I would suggest that there really isn't as much difference in viewpoint as that and it would be our job at the trial to demonstrate what of headquarters is properly allocable and we will undertake that.

THE COURT: That's right. That's my feeling, too.

MR. RAUH: And I guess the only other point is that we offered a stipulation but maybe instead of arguing that now since we have made so much progress, we'll talk to Mr. Merrill and he **[51]** can decide whether he'll accept it or not. It was on the five-year payment that we were prepared to make.

THE COURT: All right. Why don't you gentlemen confer if you have anything else to work out. I don't need to see you any more today.

MR. MERRILL: There are two or three additional points, your Honor, if I might get one further moment of your Honor's time.

On the headquarters expense allocation, this is a subject that is not novel to us as litigants. We have spent a lot of time over the years talking with accountants about how it can be done, particularly accountants having a knowledge of what goes on at the grand lodge level and I think that the Court would want to reach a result that is fair and accurate, and I think that is going to require the use of acceptable accounting standards and not just, I might say, off-the-hip proportions which I think is what the Supreme Court did in Street. They didn't think about an unbalanced budget. They didn't think about the fact that at the grand lodge level, the union has a very different emphasis in its activities than they do at the local lodge level. Certainly we have seen that here, so I would ask that the Court keep an open mind as to what the formula may prove to be.

THE COURT: Oh, I have an open mind, I think. I just think--I don't know at this time whether the international president uses ninety percent of his time to lobby Congress or what he uses ninety percent of his time

for. Maybe he uses ninety-five percent talking [52] to Mr. Rauh and Mr. Hirsh.

MR. MERRILL: I assume that they will be most desirous of amending their list of witnesses and their exhibits. I hope that they don't, but I expect that they will.

THE COURT: Well, I suggest as far as actual exhibit lists and witness lists, that you might very well--I'll permit you to vary the terms of our Rule 9 and you may submit those separately to the Court and perhaps give you another thirty days after the actual pretrial order for you to do that.

MR. RAUH: That reminds me, your Honor; do you have any idea as to the trial date?

THE COURT: That's the last thing I was going to ask you about. What is your schedule, Mr. Merrill, and yours, Mr. Rauh?

MR. MERRILL: Late March would be preferable for us.

THE COURT: I think we're looking farther than that.

MR. MERRILL: The earliest date.

THE COURT: I would think early June. How about you, Mr. Rauh?

MR. RAUH: I was just saying to myself--

THE COURT: San Diego is a delightful place in the summer. It beats Washington all hollow.

MR. RAUH: Sir, I was just saying to myself: I hope he doesn't say June. I have a friend whose name is John Stewart Service. He was the--

THE COURT: I know of Mr. Service.

[53] MR. RAUH: He has great friends in China and he's leading a group to China. We leave on the 4th of June. Now, obviously, my client comes first and that is something I would give up.

THE COURT: Is that a three-week trip?

MR. RAUH: It's a special one that Mr. Service, because of having friendships there, is able to manage. Actually I think if my heart stands, we're going to Lhasa in Tibet, and this is something I would hate to give up, although I'm not saying I wouldn't.

THE COURT: I won't make you give that up.

MR. RAUH: That's the only time. July or August would be fine, your Honor, if that's the earliest we can do it.

THE COURT: How about the 6th of July?

MR. RAUH: All right, sir.

MR. MERRILL: In light of that delay, would it be acceptable if we have sixty days after the pretrial order to exchange the exhibit list?

THE COURT: Yes, you can have sixty days after the pretrial order to exchange the exhibit list.

MR. RAUH: Mr. Hirsh points out to me that the grand lodge is moving that month. I do feel that--I'm not asking for a delay on that basis. I do feel I'll simply have to tell Mr. Kroll and Mr. Bobo that if I'm to get to China, they have to do this and move at the same time.

THE COURT: I think they can manage that. July 6 at 9:00 a.m. for trial.

(Adjournment.)

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No. 82-1150

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Respondents.

ALLEN L. FAILS, et al.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX — VOLUME IV

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PETITION FOR CERTIORARI FILED JANUARY 7, 1983.
CERTIORARI GRANTED APRIL 18, 1983.

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(Caption omitted in printing.)

TRANSCRIPT OF PROCEEDINGS
August 1, 1978

* * * *

[28] BY MR. RAUH:

Q. Mr. Kroll, directing your attention to the office of the international president, what is the function of the office of the international president?

A. The international president administrates the union, runs the union, is involved in the hundreds and hundreds of collective bargaining agreements that we have. Just about runs the union five days a week, seven days a week, so many hours a day.

Q. And your services as international president are available to Western Airlines?

A. Yes, they are.

Q. And you just testified that in this last year, they have been very much used by Western Airlines.

A. Certainly. I was very involved in their negotiations for a wage agreement, health and welfare, retirement, et cetera, deeply involved in that. I met with General Chairman Mogg several times on other matters concerning his System Board and Local Lodges, and met with groups of airline members from Western Airlines several times since I have been president, in different parts of the country.

Q. Defining the Plus 1 column overhead Paragraph 22 -- [28-A] those Paragraph 22 items of the Judge's ruling which are not in the political rebate, how much of your time and expenses -- let me finish --how much of your time and expenses would have gone to Paragraph 22 items so defined?

[29] A. Okay.

In reviewing the Paragraph 22 items very carefully, and reviewing my day-to-day functions, and I keep a calendar book that records the meetings and the travel that I have, et cetera. And knowing that -- since I

was elected president, November, 1976 -- when I took over the union, it was not in the greatest of financial shape. I had to replenish the treasury of the union in the sense I had to make a lot of drastic cuts, and I had one heck of a job to do it in regard to re-establishing our financial situation.

I eliminated forty-some jobs from the staff and changed the functions of administration around. I cut the automobiles from fifty-some automobiles to the area of seventeen, and put the vice-presidents in charge of various departments, rather than high-paid staff people, and made all types of -- sold a couple of buildings that we had -- I made all types of changes with regard to finance, so I was first confronted with that situation.

Then I was confronted with the national bargaining, and seeking a wage contract, and health and welfare contract where every railroad employee in the United States that belonged to our union, and I was also sort of the member of a subcommittee representing all railroad workers in the United States with the entire railroad industry seeking this contract; besides that, Western Airlines contract and several other contracts that we had with trucking companies, et cetera, so that I could say totally **[30]** honestly to the Court that in regards to the Paragraph 22 items, I spent very little time on Paragraph 22 items.

The few social-type functions that I ever attended with respect to the union were on weekends or at night, and in regards to the allocating of the ten percent, I felt that to go along with the Court, rather than get into a time-keeping situation or a minute-by-minute time-keeping situation, I felt it was totally impossible--not impossible, but very onerous and tremendously costly to the union--I felt in order to come into the court and adhere to the Court's direction with regards to the Paragraph 22 items, I over allocated and allocated ten percent in order to avoid any type of argument, and this is what I have done, your Honor.

Q. Turning now to International Vice-President Coleman--what is the function of his office?

A. The International Vice-President Coleman, since I was elected president in November '76, International Vice-President Coleman has been specifically assigned to the Western Airline membership. He has worked with Northwest Airline membership, and he has worked somewhat with some of the groups on the Southern Pacific Railroad,

and he has worked with me occasionally on the national negotiations situation.

Q. And does he work directly under your supervision?

A. I can say this: I can sit here and tell you where every one of my vice-presidents are today. They all work very [31] much under my supervision, and I would say there is not -- they at least call me once a week, and occasionally maybe it goes twice, once every two weeks, but I would say I hear from our vice-presidents every week, and I can tell you today just exactly where everybody is.

Q. And what percentage of his time and expenses would be on the Paragraph 22 items as I defined them to you?

A. With regards to Mr. Coleman's situation, with regard to Paragraph 22 items, I would say that knowing what he does, it is less than five percent. But again, to avoid the onerous and costly situation, we allocated ten percent to avoid any argument.

[32]Q. Are Mr. Coleman's services available to Western Airlines?

A. Most certainly, and used by Western Airline people quite frequently.

Q. I think you already testified to that. I won't repeat that.

Item Three, what does the International Vice-President Devlin do?

A. International Vice-President Devlin is in charge of the organizing department, and his department is in charge of going out and organizing the unorganized.

Also, Mr. Devlin is involved, where we do obtain recognition and membership or new properties, Mr. Devlin goes in and negotiates those agreements.

Mr. Devlin also assists myself and other officers of the Brotherhood in respect to negotiating agreements on other properties. He is also in charge of what we call Public Law Board, whereby a neutral referee sits in.

Mr. Devlin used to be the vice-president in charge of Railway Express division. Railway Express went bankrupt and later liquidated, and Mr. Devlin has been very involved in the bankruptcy proceedings and liquidation proceedings and the deals before the Public Law Board with regard to adjudication of employees' claims, et cetera.

Mr. Devlin is also involved in working with the Department of Commerce, the EDP, I think it is, or EDA, in respect [33] to resurrecting Railway Express through loans from the government and private capital put up. So Mr. Devlin has many other duties besides organizing. But again, to avoid any argument with the Court, we allocated a hundred percent with regard to Mr. Devlin, except for that which was already rebatable. So, therefore, we said more or less a hundred percent with regard to Paragraph 22 items.

Q. I don't need to ask whether he is available, because they are all available, but would they be available to Western Airlines?

A. Mr. Devlin has met, and he has accompanied me, in fact, to meetings with Western Airlines members and officers.

Q. Now, turning to Item Four, the office of International Vice-President Fitzgibbon, what does that do?

A. Mr. Fitzgibbon is primarily responsible for what we call the Allied Service Division of the Brotherhood, which is sort of the miscellaneous groups, freight forwarding companies, trucking companies, taxicabs, Disney World, skycap, things of that nature.

Mr. Fitzgibbon, to a lesser degree, is involved in organizing. And that's why I allocated thirty percent with respect to his organizing activities.

Q. Are his services available to Western Airlines?

A. Yes. And I know that Mr. Fitzgibbon is in fairly frequent contact with Mr. Mogg and has worked with Mr. Mogg [34] on various problems and some of his Local Chairmen and System Board officers.

Q. What does the office of International Vice-President Granlund do?

A. Mr. Granlund is assigned to a couple of System Boards in adjustment in the railroad industry, and Mr. Granlund also heads up our Manpower and Job Corp training program.

Q. What would his percent of Paragraph 22 items be?

A. Mr. Granlund's percent of Paragraph 22 items would vary around five percent, based on the knowledge that I have of what he does. But again, to avoid argument and avoid the onerous job and costly job of time-keeping, we allocated ten percent.

Q. Would his services be available to Western Airlines?

A. Yes. In fact, with regard to the manpower and job corp training program situation, although we haven't placed any of these unemployed under-privileged people with Western Airlines, we have placed them in the airline industry, and I know he has worked with Mr. Mogg and some of Mr. Mogg's officers and members with respect to this.

Q. What does the office of International Vice-President Kilroy do?

A. Mr. Kilroy is vice-president in charge of administration, day-to-day operation of the union, and Mr. Kilroy works very closely with me, and I can very certainly state that his functions with regard to Paragraph 22 are below ten percent.

[35]Q. I call your attention to the next item which we put in the chart solely for symmetry's sake.

You were president a full year, 1977, were you not?

A. I was president in the full year of 1977, and we did not fill my vacancy as vice-president until February of '78.

Q. So your vacancy would not appear on either of these charts?

A. Correct.

Q. What does the office of International Vice-President Lynch do?

A. Mr. Lynch is assigned to work with a few specific railroad system boards, and his primary function is to work with those boards in

negotiating and improving upon their rules and agreement. And one of his main functions is representing us at arbitration cases and public law boards in the various tribunals where we have to adjudicate grievances.

Q. And what would his Paragraph 22 be?

A. His Paragraph 22 would be almost nothing, but again, to go along with the court, we allocated ten percent to avoid costly accounting, et cetera.

Q. What does the office of International Vice-President McGregor do?

A. International Vice-President McGregor is in charge of the union in Canada, and he runs the day-to-day operations of the union in Canada.

[36]Q. What would his Paragraph 22 items be?

A. They would be less than ten percent.

Q. International Vice-President Neal's office; what does that do?

A. International Vice-President Neal is assigned to several System Boards in the southeast part of the country on the southern railroads, and his function is to work with them in respect to improving their agreements, policing their agreements, and he does handle one particular arbitration board that we have. And in respect to his Paragraph 22 items, they are almost nil.

Q. But you did allocate something to him?

A. Yes, ten percent.

Q. Now, I think I have overlooked something, Mr. Kroll.

Returning to Vice-President Kilroy, Vice-President Lynch, Vice-President McGregor, and Vice-President Neal--would their services be available to Western Airlines?

A. Well, Vice-President Kilroy -- Neal is my administrative man, and his services are there and used by the people at Western Airlines.

Vice-President McGregor --

Q. I think Lynch was next.

A. Vice-President Lynch is available if needed.

Vice-President Neal is available if needed, and the same with Vice-President McGregor, and I think Vice-President McGregor was used somewhat behind the scenes in the last negotiations on **[36-a]** Western Airlines, because we obtained an agreement for the people working for Western Airlines in Canada, and his expertise in regards to a Canadian Law and Health and Welfare up there, and was vital to us.

[37]Q. Western Airlines runs into Canada?

A. Yes.

Q. And you have employees on Western Airlines who are working in Canada?

A. Yes.

Q. Turning now to Number Eleven, the office of International Vice-President Otero. What does that office do?

A. International Vice-President Otero is assigned to two or three specific System Boards to work with General Chairmen and the membership there with regard to their contracts, but he is also in charge of the International Affairs Department and works somewhat as a liaison between myself and the AFL-CIO. But he is deeply involved in the international affairs situation. And that is why we, with respect to Paragraph 22, allocated one hundred percent, except for that which was already rebatable.

Although he does spend a good deal of time working with two or three specific railroads, again to avoid the minute-by-minute and hour-by-hour timekeeping, I allocated a hundred percent.

Q. And the office of International Vice-President Toppen is assigned to one or two System Boards to work, but primarily his duties are with regard to the health and welfare and retirement field.

Vice-President Toppen is sort of my expert with regard to health and welfare and railroad retirement and other retirement [38] plans that we have in our industries, and basically they are his duties and his item, or Paragraph 22 items are very low, but again, we allocated the ten percent.

Q. Are his services and Vice-President Otero's services available to Western Airlines?

A. Yes, they are, and I can say that Vice-President Toppen worked with the negotiating committee on Western Airlines in regards to their pension improvements that we sought and we obtained, and also in regards to their health and welfare, so he did work with the Western Airline negotiation team.

Q. Turning now to Items Thirteen, Fourteen and Fifteen, there are people described as assistant international vice-president. What do those offices do?

A. Assistant International Vice Presidents Bishop and Norton are assigned to represent the Brotherhood on Public Law Boards where the Mediation Board appoints a referee to hear the grievances, and these two gentlemen spend almost one hundred percent of their time doing that function.

Assistant International Vice-President Smith is in Canada. He does a similar function in Canada, plus he is very involved in the national negotiations situation in Canada.

Q. What would the Paragraph 22 percent be?

A. It would be -- for all three, it would be far less than ten, but again, we allocated ten percent.

[39]Q. What is the Board of Trustees?

A. The Board of Trustees is a group out of the rank and file members, or officers of subordinate units that are elected by convention, or between conventions by the executive council to serve on a Board of Trustees.

In fact, one rank and file member of Western Airlines is a member of our Board of Trustees. Their job is to supervise and audit the funds of

the union, and their job between conventions is to act as a finance committee along with the international president and international secretary-treasurer, to supervise all extraordinary expenses.

For example, if I went to -- which is not an extraordinary expense -- if I want to give a raise to the employees or staff, I have to go to the finance committee for approval, and they more or less oversee the spending of the union.

Q. And they are elected by the convention?

A. And they are elected by the convention.

Q. I will not ask you about Paragraph 22, because Mr. Robinson, the chairman, will be here.

Turning now to Roman Numeral II on Exhibit B, Attachment VI; what does the Industry Relations Department do?

A. Industry Relations Department is broken down into two sections. One section is the grievance section, which a staff of our people monitor, awards of various referees with regard to the transportation industry that we're in.

[40] When rank and file people write in to the international headquarters with regard to a problem in respect to their particular working contract, these people look up that contract. They correspond back, give advice. Many times it's by phones, and sometimes it is by mail. They work with the general chairman. When the general chairman cannot resolve a case with is [*sic*] particular company, he brings that case into our Grievance Department, and they review it with them. They tell him, "Well, it's a good case, it's a bad case." If it is a bad case, they more or less tell him not to cry wolf too many times, to forget the case.

If it's a good case, we help them prepare the case for the various tribunal it will go to.

Then you have -- besides the Grievance Department -- then you have the Rules Department, and the Rules Department is one of the key departments we have.

This group monitors and analyzes all types of contracts that are settled throughout the United States so that when we go in to negotiate, I can almost tell you verbatim just what steel got, what auto got, what the mechanics, machinists might have got, then various airlines, et cetera. It is with regards to wages, health and welfare, and so forth, so that these people are constantly updating our files in regard to contracts analysis.

They also work very heavily with the general chairman in helping in improving upon his own working rules, agreements. And also a part of that Industry Relations Department are experts that [41] we use in regards to arbitration cases and if we had a serious case.

In Western Airlines not too long ago where the jobs of a hundred and thirty people were in jeopardy, and one of my staff, Jack Fletcher, who is an expert in arbitration went and argued the case, and we were successful in saving the jobs of these hundred and thirty people in Western Airlines, so that department is a key department.

[42] MR. RAUH: Again, your Honor, we will have another witness testify.

Q. The next item, Social Insurance, what does that department do?

A. The Social Insurance Department is the department that works under Mr. Toppen, the international vice-president, and, again, handles the problems of our rank and file people throughout the country in regards to the particular health and welfare contract that they are under or the particular pension plan that they are under, et cetera. Basically, that is what they do.

Q. What does the International Affairs Department do?

A. The International Affairs Department works in conjunction with -- very involved in the United States State Department, and we are members, our organization is a member of the International Transportation Federation, which is a Congress of all transportation unions throughout the world, and a good part of the expense of that department is subsidized by the United States Government.

It's important, and we are encouraged to remain in that function because when you go throughout the world, many of our transportation unions are Communist and we are there constantly to rebut the Communist thrust. We are there to sell the way of the American system, and

I can remember just a few years ago in Stockholm, Sweden, at a convention I was at, at the ITF Congress, where the Communist delegates, or the people who were left-wing **[43]** delegates, tried to call for a two-day strike of all transport workers throughout the world in support of the overthrow or support of Allende who was overthrown in Chile, and it was Mr. Otero, our vice-president, who took the floor at that convention and pointed out that the American people, the American workers were governed by certain laws, that we could be subject to violations under the laws of the United States. And also very clearly pointed out that the workers in South America, the two particular days they were calling for a strike, were paid holidays. So it was only the American people and the Europeans who would be suffering, but it's something that we feel is a real necessity and --

Q. What did you do about the Paragraph 22 percent?

A. We made them one hundred percent except that which was already rebated.

Q. A hundred percent you allocated to Paragraph 22?

A. Yes.

Q. Now, turn to the research and education, what do they do?

A. Research and education works in conjunction with the Industry Relations Department in respect to keeping a library and doing research work, and one of the primary functions is putting on educational programs where we train our particular, teach our Local Lodge officers how to handle grievances and how to better represent the people that they represent, and how to **[44]** protect them in discipline investigations and hearings and things of that nature.

Q. Are those services available, Mr. Kroll, to Western Airlines?

A. Yes, they are put-on programs, and I would say people in Western Airlines have attended the educational programs.

Q. What is that railroad patrolmen item?

A. Several years ago the railroad patrolmen had their own union. They merged into our union, and I believe that figure of sixteen hundred

eleven dollars is a part of the agreement of merger, and it's a part time salary to several patrolmen, officers, to handle the grievances, et cetera.

Q. And what percent of that goes to Paragraph 22?

A. None.

* * * *

[45]Q. The National Negotiating Committee--what does that do?

A. By virtue of our constitution, we have a National Negotiating Committee for the railroad industry, and certain vice-presidents and general chairmen are members of that National Negotiating Committee along with myself, and we are involved in the negotiations of the railroad industry.

Q. And what percentage of that would be allocated to Paragraph 22?

A. None, zero.

Q. And the Canadian Negotiating Committee?

A. The Canadian Negotiating Committee in Canada negotiate their railroad contracts on a national basis, and pursuant to the Canadian portion of the constitution, they have a negotiating committee made up of full-time and part-time officers, and they are involved in the negotiations in Canada.

Q. And what Paragraph 22 activities would they have?

A. None, so we have allocated zero.

Q. The next item is the Harvard Trade Union Courses where there were no expenditures for '77, but would you explain what it was since there have been expenditures for other years?

A. The Harvard Trade Union Courses; the University of Harvard puts on a thirteen-week course -- I believe it is thirteen weeks -- where both labor and management people attend this thirteen-week **[45-a]** course, and they are instructed in respect to collective bargaining processes and problems that you can reach in collective bargaining, how to reach them, et cetera, and it is a combination of both management and labor. And in the past we have sent representatives of our union to that university.

[46]Q. But none went in '77?

A. No.

Q. What is the manpower training item there, Mr. Kroll?

A. Manpower training is that we enter into contracts with the United States Government to train hard core unemployed, underprivileged people between the ages of eighteen and twenty-one, and we have -- our union operates about eight training centers in the United States, and these hard core unemployed are referred to us by various agencies and we take them in, and it's roughly a fourteen-month course. We train them in hygiene. We train them in dress, in mannerisms, and we teach them specific trades that fall within our industry, such as typists, reservation clerks, ticket clerks, computer work, and things of that nature.

And then after the fourteen-week course, we endeavor to place them in industries primarily where we represent people, and get them off the rolls of welfare and unemployment and make them contributors to our society. And I would say that of the people that attend the school, we place about ninety some percent into jobs, and the retention rate after one year is something like seventy-nine point one. I think it's the highest retention rate of any government project such as this.

Q. This is a government project?

A. A government function, yes.

Q. And what Paragraph 22 items would there be here?

A. None.

[47]Q. Would you explain the International President's Bulletin?

It has an "N.A.," for not applicable, in '77, but there were some other expenditures. What is the International Presidents Bulletin?

A. The International Presidents Bulletin is a publication that we put out four times a year, which highlights various awards we have received from the various referees or arbitrators throughout the country in the various industries that we represent, and it also -- we publish their rules, contract agreements that were signed with various railroads or airlines

throughout the United States. And it is more of an educational thing for Local Chairmen and Lodge officers and general Chairmen. They can use these cases as precedents, et cetera.

[48]Q. Mr. Silard asked me to go back to manpower training. Why do you do it?

A. Well, to be very honest with the Court, over the years sometimes labor gets an unfair taint, and we feel that besides the representation of our people, that we should also have somewhat of a social conscience, and you have a critical unemployment situation in the United States, and particularly of minority groups, and we feel if we can get these people off the rolls of welfare and unemployment and show them what they can do in society and be a part of society rather than just take from society, they can be contributors to society.

* * * *

Q. Have large number of the people so trained been hired by the employers you deal with?

A. Yes.

Q. Turning now to Professional Services--what are they?

A. Professional Services is the accounting firm that we use. It is the people that we use in respect to negotiations whereby we retain economists who can, to the best of their ability, predict inflation, and things of that nature. Health and welfare [49] experts, pension experts, and things of that nature.

Q. And how much of that is attributable to Paragraph 22 items?

A. None.

Q. Turning now to III. What is the Administration Department?

A. The Administration Department is the department that works under me in respect to the everyday administration of the union and the necessary housekeeping functions that are entailed in operating an organization.

Q. And what percent of that would go for Paragraph 22 items?

A. Well, the Administration Department is practically my immediate staff, and knowing what my functions are, and what the functions of my immediate staff are. At the review I conducted, I felt it was far less than ten percent, but again, to avoid the onerous bookkeeping-type situation, which would be costly, and to avoid argument with the court, we allocated ten percent.

Q. The item Administration-Washington; what is that?

[50]A. Administration-Washington is really my administrative assistant in Washington who works almost every day with me.

Q. And what would his activities in Paragraph 22 be?

A. His activities with regard to Paragraph 22 are far less than five percent, but we allocated ten.

THE COURT: Doesn't he do a little lobbying?

THE WITNESS: Not this individual, no, your Honor. We have a Legislative Department that is headed up by a National Legislative Counsel, Jim Kennedy, and Mr. Kennedy has a staff, which Mr. Costa is not a part of, and the lobbying is done by Mr. Kennedy and his group. And if you met Mr. Costa, you'd recognize that he is not a lobbyist.

MR. RAUH: If your Honor please, Item 66 is the Legislative, and we will get there.

THE WITNESS: Really, your Honor, what Mr. Costa does is handle a lot of my appointments and takes care of the airline tickets and keeps records for me and files and things of that nature.

BY MR. RAUH:

Q. Now, there is an item on here, thirty-three, the Philadelphia office, with a statement, "Not applicable." What is the explanation for that, Mr. Kroll?

A. When I was a vice-president, I had an office in Philadelphia, and I had a staff assistant, and as I became president, the staff assistant

remained for a few months, but it [51] was more or less eliminated in 1977. Although I do work frequently out of the Philadelphia office, it's a System Board office, and it's the former unit that I was former general Chairman of. And the Conrail headquarters is in Philadelphia, which is about one-fifth of our railroad membership, so I do spend a bit of time up there, but there's just no charge for it.

Q. The Montreal office. What does it do?

A. The Montreal office is our administrative office in Montreal which contains some of the officers and staff people, and they handle the administrative and necessary housekeeping functions of Montreal, Canada.

Q. The Canadian Executive Council Administration. What is that item?

A. Pursuant to the Canadian portion of the Constitution, they have an executive council of their own, but it's really superseded by the International Executive Council, but they have an executive council of their own.

Q. And what Paragraph 22 items would there be there?

A. None.

Q. Drawing your attention to Item Forty-Five, annuities. What is that?

THE COURT: You are skipping to forty-five?

MR. RAUH: Yes, your honor. I have on the chart up there, as you can see, Mr. Bobo and Mr. Howard are going to deal with those.

[52]We intend to fill it in, sir.

THE WITNESS: Item Forty-Five, annuities.

A portion of that, many, many years ago convention delegates of the convention voted in favor of then President George Harrison, that when he would die, his wife would receive an annuity, and that is a portion of it. And then when we merged other unions into our union, for

example, sleeping car porters union, by their own convention action, previous years, they had provided annuities for like A. Phillip Randolph, who was the former president --

THE COURT: For years and years.

[53]THE WITNESS: And through the merger, it was our obligation to maintain the pension, and he is still alive.

BY MR. RAUH:

Q. What would your Paragraph 22 items be there?

A. None.

Q. Separation Allowance: what is that item?

A. Separation Allowance was when Mr. L. E. Dennis separated from the union.

THE COURT: What item is that?

MR. RAUH: Forty-seven, your Honor.

Q. And what was the Paragraph 22 aspect there?

A. None.

Q. Turning now to IV, Item 60. What are those Labor Affiliations?

A. Those Labor Affiliations are affiliations with AFL-CIO, United States, the Canadian Labor Conference of Canada, and these are monies -- are per capita tax that we pay to those groups and certain departments of the AFL-CIO and an organization called the Railway Labor Executives Association, and associations such as that.

Q. And that is all rebated under the October 6, '75 plan?

A. Yes.

Q. So there is nothing there for the Paragraph 22?

A. Yes.

Q. It is all being paid back separately?

[54]A. Yes.

Q. The next item is the Convention. What is the Convention?

A. The Convention -- we hold a convention every four years, and that item of monies there was probably monies spent in regards to our staff going to the city that was selected and negotiating with the various hotels and convention centers, and things of that nature. And we allocated all that to Paragraph 22.

Q. What is the Death Benefit?

A. Death Benefit is something that has been going on for many, many years in the union, and a portion of the dues goes into the Death Benefit Fund, and I believe it started in the years of the Depression when it was tough for people to bury somebody, and so forth. And today, when an individual -- a member dies, they get three hundred, and that is from the Death Benefit Fund, and we allocated all that, except anything that was rebatable. We allocated all that to Paragraph 22.

Q. And the item of Organizing; what is that, generally?

A. Organizing is the Organizing Department. Its primary responsibility is to go out and organize the unorganized. However, I can say we use organizers to assist some of the general chairmen.

The organizers are more or less experienced people who have come up through the union and sometimes they assist the general chairmen in negotiations with regards to contracts and properties.

[55]Sometimes if local chairmen are having problems, we send them in to assist the local chairmen in regards to helping police the contract, et cetera, but again, to avoid any argument, we allocated the whole hundred percent to Paragraph 22 except that which was already rebated.

Q. Are the organizing activities available to Western Airlines?

A. Yes, I can say that they have been in use on the West Coast with the Western Airline general chaiman and some of his officers.

Q. Are the death benefits available to Western Airlines?

A. Yes.

Q. Are there convention delegates from Western Airlines?

A. Yes.

Q. Turning now to the Official Publication: what is that?

A. The Official Publication is the Railway Clerk Interchange, but we also put into the publication the President's Bulletin.

But the Railway Clerk Interchange is the magazine that we put out ten times a year, and I can honestly say there is a good bit of collective bargaining items in it, because we have had a tremendous difficulty this year in negotiating a national contract with railroads, and we had problems in the Western Airlines contract, and we had to keep the people abreast, and it was through the magazine that we were keeping them abreast of what the problems are.

[56]However, because of some picture of retirees and pictures of some social function or pictures of lodge meetings, your Honor, we have allocated the whole thing except that which was already rebated.

Q. What is Disaster Relief?

A. Disaster Relief Fund is where a portion of dues goes -- it is actually a fund -- in that when we had some serious calamities in the United States -- Hurricane Agnes, floods in the Midwest or on the West Coast where members' houses were lost, or a good deal of their possessions were lost, we then had the Disaster Relief Fund have an investigation and give these people money to get started back up again, to help them buy furniture, clothes to put on their back, and help them through this very trying time.

Q. And what percent of that was allocated to Paragraph 22?

A. One hundred percent.

[57]Q. Item Sixty-Six, Legislative. Would you explain that as against the Washington office item that you referred to before that the Judge asked you about?

A. Yes.

The Legislative Department is located in Washington, D.C. It's headed up by our National Legislative Counsel and his staff, and this is the group that works on legislation that is sometimes pending or being introduced in the United States Congress or the Senate.

It can have an effect on railroad or airline employees.

I would say in the year of 1977 the Legislative Department was very involved in the airline industry because of the airline deregulation bill, because of the noise abatement bill, and we did a lot of lobbying. Our legislative people did a lot of lobbying with regard to the airline industry in 1977.

They also work with the Secretary of Transportation. They work with the Civil Aeronautics Board. They work with the Federal Railroad Administration, with regard to programs and policies and orders that the various government agencies put out, although some may disagree. A lot of the things they are involved in, and do have an overflow in respect to collective bargaining, but again, we have rebated the whole hundred percent.

Q. That is under the October 6, '75 plan?

A. Yes.

Q. Mr. Kroll, you will notice at the bottom of each of the [57] four tables that I have put up on the chart, and that are Attachment Forty-Five, at the bottom of each of the four tables appears a figure representing collective bargaining for Western Airline members.

Could you explain these figures for us?

A. Well, what we did here was we figured out the total collective bargaining costs, say, for the first attachment. As an example, Attachment One. We figured out the total cost of the collective bargaining for 1977, and then we took one point nine, which is the airline membership in

our union. We took one point nine of that total and arrived at, hypothetically, that figure of sixteen thousand six hundred one dollars in Attachment One, and we more or less said for purposes of allocation, that is what is allocated for the Western Airlines people for collective bargaining in regards to the officers of the union. Attachment One.

But I can say that the services of the entire collective bargaining setup is always available, your Honor, to the Western Airlines people, and I can say, your Honor, that, for example, it may vary from year to year, but in the year 1977, in all the preparation for the collective bargaining agreement on Western Airlines, I can say accurately we exceeded -- knowing the work that my people have done, we exceeded the sixteen thousand dollars, but it would vary from year to year.

But again, to try to show the Court, we have said that **[59]** here's the collective bargaining costs and the Western Airlines is one point nine of the membership, and we took one point nine of the total figure of the collective bargaining costs, and the resulting figure is what we allocated or proportions for the Western Airline people in regard to collective bargaining.

Q. And that is equally true of II, III, and IV?

A. Yes.

* * * *

(Caption omitted in printing.)

TRANSCRIPT OF PROCEEDINGS
August 8, 1978

* * * *

[776]Q. President Kroll testified the first day of this trial that these tables, B and C, also known as Attachments V and VI, were a joint product of work by himself, Mr. Bobo and others including yourself.

Did you participate in the preparation of these tables?

A. Yes, I did.

Q. Turning to the column labeled costs, every page has a column with cost figures in it. Did you prepare and supply all of those figures?

A. Yes, I did.

Q. What were the records that you consulted in supplying those figures?

A. Our year-end financial statements.

[777]Q. Were those the only records you consulted?

A. For the costs, yes.

Q. Yes.

Those statements are in evidence as Defendants' BT, as in Tom, and BW, as in Walter.

Turning to the first table, the one already upon the easel there, what do the cost figures represent?

A. Salary, travel expense, the proportion of fringe benefits for those individuals or department heads.

Q. Are those the only costs associated with those officers there?

A. Yes.

Q. How did you determine the amount of fringe benefits?

A. The fringe benefits amounted to approximately 35 percent of the total salaries. I applied that radio against that particular salary or department and added that to it.

Q. Turning now to the second table in the 1977 chart, I observe, in addition to the cost figures, you are also scheduled to testify on a couple of functions in Paragraph 22 allocations. We will start with the cost figures.

Again, exactly what do these cost figures represent?

A. In items 17, 18, 19, 20, 21, 22, 24, and 26, they represent salary, travel expenses, fringe benefits.

Q. Is that also true of No. 25?

A. 25, there was no expenses this year.

[778]Q. In the remaining three, the bulletin where there were no expenses, professional expenses, and membership, do those lines include any personnel costs?

A. No.

Q. We will now turn to the items where you will testify about the function of the Paragraph 22 allocation.

The first one is Line 18, social insurance, what exactly is that?

A. That is the salary, fringe benefits and travel expenses for a secretary and an assistant who worked with International Vice-President Toppen, who is in charge of the social insurance program.

Q. And the Paragraph 22 allocation?

A. There were none. I believe that in the earlier testimony, International Vice-President Toppen was allocated a part of the salaries, fringes, because of his work as International Vice-President and not his connection with his health and welfare work.

Q. And the people who worked for him?

A. Are not engaged in any type of Paragraph 22.

Q. The next line that you are to testify on is Line 22, REA O'Hare. There is a very small expense and I think I will hold the major explanation of what that is about until we get to 1976 and state the figures there.

Could you say, briefly, what the $37.84 was?

[779]A. It was a payment to the former REA employee. I am not really sure what purpose. Apparently, somebody performed some service and we reimbursed him.

Q. The next one is Line 29. That is on the next page of the small-sized exhibit, membership protective.

A. There was no expenses this year. There were small expenses, '76, in that category.

Q. And the one in '76 was for --

A. Payment of about a hundred dollars to an arbitrator, I believe a gentleman by the name of Rubenstein.

Q. Well, go now to the third chart.

Here again, you will be testifying about all the cost items and a number of the individual items on the first column. Again, what areas of expenditure do the cost figures represent?

A. Items 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, and 47 -- 48 -- all represent salary, fringes, and travel expense for those particular departments.

The balance of the items are non-salary items.

Q. Would you tell us about the item on Line 33, Montreal Office?

A. That represents the staff and clerical employees who work for International Vice-President McGregor in our Canadian office.

Q. What was the Paragraph 22 allocation for them?

[708]A. There were no Paragraph 22 allocations, in that their function is to assist in collective bargaining in Canada. The other employees who might be engaged in this are charged to the organizing fund and that would show up later as completely Paragraph 22.

Q. Do these Montreal employees do such things as maintain membership records?

A. Yes, maintain membership records and assist in the administration of the collective bargaining agreement in Canada.

Q. Line 36, data processing, I believe you testified that you are the head of that department?

A. That is right. That represents the cost of employees of that department.

Q. What does that department do?

A. They are all engaged in running our computer department, I mean, it represents the key punchers, the programmers, system analysts, computer operators, other assistants, and clerical employees.

Q. And the Paragraph 22 allocation?

A. In regard to Paragraph 22, I took the activities of it for a period of key punch operators and analyzed the work being performed by them, and then, since the total output of a computer department is reflected by what is being input, I broke those into various categories, and from them, determined the time that **[781]** they spent arriving at the percentage of time, Paragraph 22, and the percentage that was not Paragraph 22. I arrived at a figure of seventeen and a half percent and I applied that to the totals for the department and arrived at $35,000 in Paragraph 22.

Q. Next line, 37, comptroller?

A. That represents my salary, and assistants of the staff, assistants that work for me, secretary and clerical workers, and in arriving at Paragraph 22, those persons working for me in this area with the exception of myself do not have any Paragraph 22 functions. So that I took my

salary, fringes, and travel expenses, and applied the same seventeen and a half percent to that and entered that as Paragraph 22.

Q. Line 36, the transfer allowance; what was that?

A. The Brotherhood has a policy of paying a transfer allowance to anybody being transferred to cover. I believe we refer to it as lace curtain money which is to cover expenses that a person will incur. The most of our contract applied to each person will be given a flat allowance for moving.

This is what this represented, plus the travel expenses for, I believe, it was four people who had gone to Rockville, Maryland, to look for new homes. It was the policy of the Brotherhood that people were given -- were allowed a trip at the Brotherhood expense to try to locate a new home through the transfer of our organization and we wanted to segregate all of these **[782]** costs so that we could determine at the end of the move what total costs were involved in moving from Chicago to Rockville.

Q. Line 48, pension prior service funding?

A. In 1969, the Brotherhood of Railway Clerks and Transportation and Communications employees effected a merger and under the provision of this merger, the employees choosing to transfer to Chicago became covered by the Staff Retirement Funds of the Brotherhood of Railway Clerks, and in addition, each person transferring was given prior service back to the date of their first full-time employment with the Transportation and Communications Employees Union.

This occurrence from the standpoint of our staff retirement fund caused an actuarial problem and this past service has been the funds under the terms of the agreement of the Brotherhood of Railway Clerks, the funds in the past, we have been paying this all yearly.

Last year, we were in the position to clear this debt up, and that represents the final payment on past service for the Transportation and Communications Employees Union.

Q. The Paragraph 22 allocation?

A. None.

Q. Line 49, auto expenses?

A. That represents the cost of the leased automobiles held by the officers of our union, and the gasoline and oil, repairs, [783] and insurance.

Q. And the Paragraph 22?

A. From that we have deducted $7,000 which represented their reimbursement for personal use.

Q. The Paragraph 22 allocation?

A. It was twenty-two and a half percent arrived at by taking the sixteen percent holding the car. I figured out from our prior schedule what percentage of their time had been characterized as Paragraph 22, arrived at a total percentage out of a total of 1600 percent that was available, arrived at a percentage of twenty-two and a half percent.

Q. There was a mistake in the Magic markings on the big chart, Line 51, depreciation. Mr. Howard is handling that category.

Can you tell us what depreciation is?

A. Yes. It represents the depreciation on office furniture and equipment at our various locations.

Q. I believe there is a subschedule?

A. There is a subschedule on that.

Q. Do you have it there?

A. Yes, Item 51.

Q. Could you look at the various categories there, just tell us why you made the Paragraph 22 allocation you did?

A. The first item was the Washington office. In our Washington office, we have activities of the International President, [784] the International -- our International affairs operations and the Legislative Department, since the operation should be international, our International funds and the Legislative Department are a hundred percent Paragraph 22. I

took two-thirds as being Paragraph 22 and one-third as not.

On the O'Hare, that represents the cost of depreciation and equipment at O'Hare. The nineteen and a half percent was arrived at by using the same percent.

THE COURT: The same percentage as on the building expenses?

THE WITNESS: Right.

The Montreal office, Philadelphia office, Omaha or Laurel, those of the offices of various International Vice-Presidents who have been previously allocated as 10 percent. The item marked New Jersey represents the office of the Vice-President Devlin, who is the head of the organizing department and is a hundred percent Paragraph 22.

BY MS. LEVY:

Q. The next line, back on the main chart, is Line 52, insurance?

A. That represents the cost of fire, burglary, workmen's compensation, and also a legal-type fidelity bond.

Q. What is that for?

A. It was a bond that was purchased to pay the legal expenses of any officers or employee who might be sued while **[785]** in performance of that duty as an employee or officer of the Brotherhood.

Q. What was the Paragraph 22 allocation?

A. We use an allocation of twenty percent. We felt that primarily was an administrative cost, which had been previously distributed at a rate of ten percent, but due to the fact there were officers and employees covered under this particular plan, whose Paragraph 22 were higher than that, we doubled the rate, figuring that would adequately cover the Paragraph 22 cost.

Q. The next item is office expense. There is also a subschedule for that item. Could you tell us what that is and how you made the Paragraph 22 allocation?

A. The total costs there represent the basic office expenses, the telephone, postage, office rental, and so forth, to the Brotherhood, and the exhibit then will break these down into various categories and their distribution.

Q. Why don't you go through the items, the given percentage, and tell the Court why that particular percentage is used?

A. On the rent, for office equipment, for example, the two items marked Rosemont, IBM and Rosemont, others, the IBM equipment, previously, the salaries have already been distributed at seventeen and a half percent. The others represented other leased equipment, Xerox equipment, building and purely used as an administrative purpose at ten percent. The Washington office, **[786]** this was a little different than the depreciation, the leased office equipment here represented only that used by the International Affairs and the President, so we split it fifty percent.

The equipment rental for the Legislative Department had been charged to that particular fund, a hundred percent characterized as Paragraph 22.

Montreal, again, it was distributed on the same basis as we did International Vice-President McGregor, ten percent on the repairs. Rosemont repairs were distributed at ten percent. Again, Washington was split 50-50 with International Affairs.

Q. All right. I believe we see the same offices and percentages as we go down the line until we get to dues and subscriptions, industrial relations, the very last line on that page?

A. Yes. And that industrial relations has no Paragraph 22 functions, and, therefore, any subscriptions that they may have would be non-Paragraph 22.

[787]Q. Going to the second page of the subschedule, the next item is research and education and there you used a Paragraph 22 allocation of twenty percent.

A. And I believe that twenty percent was used the same as the percentage that we used in allocating their salaries.

Q. Going down to the item, rent, why were you paying rent at Rosemont?

A. In 1977 we sold the building in Rosemont, Illinois, and became a tenant of the persons who purchased it and that represents the rental payments for approximately three months, I believe.

Q. Then in the last --

A. We used the same distribution there as we did on the building before.

Q. On the last category, miscellaneous office expenses, there are some offices that have not previously appeared in the subschedule. Could you tell us what those are and why the particular allocation you made was given?

A. The one marked third division represents the office of the staff member of the organization, Mr. Jack Fletcher. Jack Fletcher heads up our railroad board in Chicago. It's an arbitration-type board and he presents those cases which have not been satisfied, had not been handled either at a lower level, that is, in relationship between us and the carrier. That final step in handling these grievances is this third division board which [788] represents the clerical employees on the railroad. That's the cost of his office. It has no Paragraph 22. It's all collective bargaining.

Q. And then there's Cupertino.

A. Vice-President Coleman lives there, which I understand is near San Francisco and he operates out of his home.

Q. And the ten percent: Is that part of his allocation?

A. Yes, it does.

Q. Philadelphia, I think we have had before.

REA?

A. REA is -- in 1976 the Railway Express went bankrupt and at that time we closed out the System Board representing those persons. At the same time their treasury was turned over to the Grand Lodge. That didn't terminate necessarily the work that's involved in handling -- their office expenses are separated and put into this category. They have no Paragraph 22. They are caused by our representation of the people in the

REA, former REA Division.

Q. And then there is a group of cities here: Omaha, Laurel --

A. Omaha is the office of Vice-President Granlund. Laurel is the office of Vice-President Lynch. Roanoke is the office for Vice-President Neal.

There is no figure in Florence but previously we had a staff employee who resided in Florence, South Carolina.

And Manpower, I believe, we have discussed before. That's [789] cost involved in a Manpower Training Department.

Q. The final item is interest expense, IBM. What's that?

A. We decided that it would be more economical to buy our computer system rather than to continue renting it, so we have purchased it from IBM, and that represents the interest expense payable to IBM.

Q. We are back on the main chart again at Line 54, membership services. What are those?

A. Items such as membership cards, lodge supplies, twenty-five-year pins, scholarships.

Q. And I notice that there is some money rebated under the political and charitable rebate system of the union itself. What about Paragraph 22?

A. Exclusive of the amount that has been rebated, there were no other Paragraph 22 items in there.

Q. That finishes us with this chart. I will put up Chart IV, now.

Again, you supplied the cost figures on this?

A. Yes.

Q. I think that because we are getting into the other funds of the Brotherhood here, we will take each cost item line by line as Mr. Howard explains the functions.

The first line is Line 56, general fund, other expenses, and there is a subschedule for that also.

Would you tell us about that?

[790]A. Yes. The subschedule outlines the items that are contained in this category, that is, donations, refunded dues, disaster relief, banquets and lunches.

There were in 1976 speaker honorariums; none in '77.

There are some miscellaneous expenses which did not seem to be appropriately charged to any place else and they were placed into the miscellaneous category.

There is an item for foreign travel, and then there is one big item for the Interfund Service Charge, Canada.

There are -- I would first say there are no Paragraph 22 items in this category. There are, of course, a large amount of rebate items. The one item I think that is unusual is this Interfund Charge. Within our accounting system we have built in a system covering Canada so that we can segregate our operations in Canada from those of the total operations of the Brotherhood. At the end of the year we then go through and charge Canada for certain overhead items which we believe they should pay for such as the president, the international secretary-treasurer, much of his department, data processing, and so forth. So that what, in effect, happens is we are showing on our expense distribution a cost of the services because we are charging them to Canada. We are also showing in our income statement a similar amount of income to the United States from the Canadian operation. It had always been felt in the past that we were not able to properly draw a line between what was being done with the money **[791]** in Canada and what was not, so we built within our system a Canadian accounting system and they are given monthly statements on the expenditures and receipts in Canada alone.

Q. Back up to the main chart, Line 57, legal -- would you tell us what those costs cover and how you make the Paragraph 22 allocation. There is also a subschedule for legal.

A. I think the subschedule itself lists the items that are in this legal. It represents the salary fringes, travel benefits of our in-house counsel and

their staff. It represents the professional fees being charged for outside counsel, consultants, some labor affiliation, arbitration expenses, strike benefits.

In regard to the salary fringe benefits and travel expenses, the Paragraph 22 items were arrived at by an examination of the reading files for the legal department for the months of March and April of '78.

Q. Did you do that examination?

A. Yes, I did.

Q. What did you do when you examined them?

A. I went through their reading file and made a determination in looking whether this was an expense for collective bargaining or whether it wasn't, and after I had finished going through and making my judgments, then I discussed with our general counsel and his assistant, Mr. Hirsh, my feelings in this matter, and in some of the cases, they said that, "No, you don't understand this, and this is something else," and this maybe was litigation where **[792]** I had thought it was negotiations.

So after arriving at that, I took a count of the numbers of letters written for the two months, arrived at a percentage, applied it to the salary, and fringe benefits, and made the appropriation between 22 and collective bargaining.

Q. You also allocated Paragraph 22 costs to the professional fees. On what basis did you do that?

A. I went through the legal expenses for the year, case by case, and again, following the same procedure as I did then, determining whether they were litigation expenses, negotiations, or so forth, and then after I had made my distribution, I went back to the legal department and said, "Is my understanding of these completely right?" And there were cases where they said, "No, you are not right," and so after we did that, I had then a dollar figure and the dollar figure represents what we calculate to be Paragraph 22 and what wasn't.

Q. Consultants: There is no Paragraph 22 cost listed. Who are the consultants?

A. Well, the bulk of that particular year was the review board that was set up by our expense account discussion that we had in, I believe, San Francisco. We asked for a Public Review Board for the rebatable items. I think there are three members of that and each get $1,000 in a year, so $3,000 of that --

Q. By that you are referring to the Public Review Board?

A. Yes.

[793]Q. That review board would review, if asked, a political rebate amount; is that correct?

A. That's right.

THE COURT: Governor Brown --

THE WITNESS: Governor Brown --

MR. HIRSH: -- Mentschikoff and Bradley.

THE WITNESS: The balance of that was a legal fee which occurred in connection with our -- I think it was the final part of a fee in our September meeting of the executive council at which time President Dennis resigned.

BY MS. LEVY:

Q. The next big item is labor affiliations. That's a little odd because thirteen thousand eight hundred is listed twice and there's a minus item under collective bargaining.

Can you explain to the Court what happened here?

A. Yes. There were $22,440 worth of expenses in this category. $13,800 were of a rebatable nature and had been included in the rebatables. It has been reported. The balance of it was payments to the Canadian Arbitration Association which were collective bargaining but in putting the chart together, it was listed as Paragraph 22 and also as rebatable, since it was of a minor, would have a minor effect, and it would not have reduced the Paragraph 22 costs, we just left it alone.

Q. It increased the Paragraph 22 costs?

A. Yes, it increased the 22 costs by thirteen thousand.

[794]Q. There was no harm done the plaintiffs.

Arbitration and strike benefits speak for themselves.

Could you explain what the third division of awards is. There were some in '76, I believe.

A. There is a gentleman in St. Louis that takes the awards of this third division and puts them into order and it's kind of like a service that he sells and we buy this service from him.

* * * *

[882]MR. SILARD: So we will go all the way through, then, when we finish these twelve items on the chart.

Q. Now, Mr. Bobo, am I correct that we have asked you to testify as to twelve of the departments or functional categories on this overall chart for Grand Lodge for 1976 and 1977. Most of those are under your jurisdiction; is that correct?

[883]A. That's correct.

Q. And I think we'll start with your own department, IST department, which is Item 35 on this chart.

MR. MERRILL: Are you doing 1976 or 1977?

MR. SILARD: We will do 1977.

Q. First, will you please tell us what the department does under your direction?

A. The IST department is under my jurisdiction and supervision. The IST department receives all monies due the Grand Lodge, pays out all the funds upon approval of the international president.

The international secretary-treasurer's department has several departments within the IST department. For example, the cashier's department, the comptroller, the data processing, MR-1 per capita tax, death benefits, audit and bonding, administration. All of these departments operate under my jurisdiction and supervision.

In addition to that, we have approximately 900 secretary-treasurers in the field in the lodges and System Board who communicate with our office almost daily for advice and information and we handle their problems.

Q. In general, Mr. Bobo, are the services of the IST department and those others mentioned -- cashier, comptroller, data processing, and the others -- available and made available to Western Airline members?

[884]A. Yes, they are. They are made available on an equal basis.

Q. Now, have I asked you to examine into your own work and that of the people directly under you in the IST department and to testify to the maximum that the totality of that work and expense of 1977 could come to for Paragraph 22 activities? Have I asked you to do that?

A. Not yet.

Q. I am about to ask you.

Have I asked you to do it just now, yesterday, for the preparation of this case?

A. Yes, you have.

Q. And could you give us that answer yes.

For myself, as IST, my services for '76 and '77 have been almost totally involved in activities other than Paragraph 22. I have had some, but substantially they have been much less than, say, ten percent. But for the purpose of avoiding undue accounting burdens and litigation costs, I allocated ten percent of my time to Paragraph 22.

Q. In so doing, did you have an opportunity to review your personal calendars?

A. Yes.

Q. And do they confirm your conclusion?

A. Yes, they do.

Q. I'd like to turn to Item 40: administration, IST, and **[885]** would you please tell us what that is?

A. Yes. Administration-IST actually is another department under my jurisdiction and supervision and only involves one employee. First assistant to the IST, Roger Long. He carries on the routine administrative duties of the IST department and handles the department in my absence when I'm out of town, and his Paragraph 22 activities for 1977 and '76 were substantially less than ten percent, but for the same reasons that I did in my own case, I allocated ten percent in order to avoid any undue accounting burdens.

[886]Q. Turn to Item 38, reproduction and switchboard with two employees.

A. Yes.

Q. Is the switchboard under your jurisdiction at this point?

A. At this particular time, the switchboard is under my jurisdiction, but for '77 and '76, it was not under my jurisdiction, it was under the International President's jurisdiction.

The reproduction and switchboard has two employees. One employee handles all the reproduction of the Grand Lodge and the other employee handles all the incoming phone calls for the switchboard for the Grand Lodge and their accounts certainly are substantially less than 10 percent and it is an overhead function essential to the procedure, however, we do allow 10 percent for the same reason to avoid the undue accounting burden.

Q. Item 41, would you tell us what the function of the audit and bonding department --

A. The audit and bonding department is under my jurisdiction and under my supervision, and that department provides and supervises the

bonding arrangements for the various units of the Brotherhood, including the Grand Lodge of the Brotherhood.

It also receives and checks the various audits that are sent in by the Boards of Trustees. In other words, each unit [887] has a Board of Trustees. They are elected by the members of the Board. Trustees audit the books twice a year, mail them into the audit and bonding department, and that department checks and reviews them, and then writes a letter back to that unit either telling them of any irregularity and to give them some advice on how to handle their books, and this is all handled by the audit and bonding department.

The department also checks various governmental reports that we file in accordance with the law with the Department of Labor.

Q. Does it handle Western Airlines audit and bonding functions?

A. Yes, it does. Western Airlines --

Q. On occasion, for Western Airlines, we have heard from Mr. Merrill that your duties, you wrote letters asking for corrections and improvements in the auditing and record-keeping functions of locals, Western Airlines, assisting bonding that would be incurred.

A. Yes. I am not aware of all the letters they have written, but I do know specifically, it seems like maybe two or three years ago, we had specific letters going out to Western Airlines for irregularities.

Q. What is your Paragraph 22 classification for auditing and bonding?

A. The auditing and bonding department, under Paragraph 22 we allocated zero.

[888]Q. What about Category 42, auditors?

A. Auditors, they are under my jurisdiction and supervision and they work out of the auditing and bonding department. The auditing and bonding department handles their movements, and these auditors are empowered to examine the books and records of all units of the Brotherhood. And, of course, those services are available to Western Airlines on an equal basis, and we did not allocate any Paragraph 22

activities to the auditors.

THE COURT: How come you got some rebatable things in there to the auditors?

THE WITNESS: For example, what -- I don't remember.

THE COURT: Your $280.38?

THE WITNESS: Yes, that would be something that they got involved in that they put on their expense account that, for some reason, they got involved in such legislative activity or something, and it amounted to $280, and that is the record that Mr. Howard was talking about that they put into the computer.

We have an expense account with a separate rebatable expense form attached thereto, and if you ever get involved in a rebatable activity, you are supposed to put it on that form in your expense account. They are not normally involved in any Paragraph 22 activities, say, $280, this was something unusual.

[889] BY MR. SILARD:

Q. I believe there is testimony of auditing of RCPL accounts and rebatable by a member of the department.

Next item is 55, the fidelity fund. Is that still under your jurisdiction as in the case of the previous?

A. Yes, the fidelity fund is under my jurisdiction and supervision and that fund represents the receipts for bond premiums and out of that fund is paid the payments to bonding companies that handle the bonds for various units of the Brotherhood, and that fund, of course, is in no way involved in Paragraph 22.

Q. What about the Category 43, the per capita taxes, and would that be under your jurisdiction here?

A. Yes, the per capita tax department is a department under my jurisdiction and supervision. It handles all the paper work in connection with the dues and fees paid to the Grand Lodge. That department bills the various units. It receives the reports, the per capita tax reports from

the unit, along with their checks. It receives the monies, the dues collected, and that department checks these reports, makes adjustments, according to any change in the membership status, for example, the full-paying member might be disabled and there may be some change that the department handles all those reports, keeps all those records, and, of course, those activities are available to Western Airlines and on equal basis, and we charge [889] nothing in Paragraph 22 activities in the per capita tax.

• • • •

(Caption omitted in printing.)

TRANSCRIPT OF PROCEEDINGS
August 9, 1978

• • • •

[896]Q. Let's turn, then, to the next item, Mr. Bobo. We are still on departments under your jurisdiction. This is Line 44, cashier department.

MR. MERRILL: 1976 and 1977, Mr. Silard?

MR. SILARD: We are still doing '77.

Q. What does the cashier department do?

A. The cashier's department is under my jurisdiction and supervision, and that department receives all the incoming checks and cash, makes deposits, makes withdrawals, pays bills, when authorized, handles the payable, and it's a necessary housekeeping function of the Brotherhood, and I do know for a fact that they do less than 10 percent.

But I did allocate 10 percent of their time toward Paragraph 22.

• • • •

[900]Q. The next item is Item 50, building expenses. What is that building expense and what did you do?

A. Building expenses is not actually under my jurisdiction and supervision. However, it was assigned to me and I allocated 19.5 percent, so I personally visited each department and actually **[901]** walked off the footage and made my own calculations of the 19.5 percent. That's one I did myself. I stayed around after hours one night and visited every department that had some involvement in Paragraph 22 and I took the total footage and made the percentage comparison.

Q. And that's what yielded your 19.5 percent. What was the building expense itself? What is that expense in 1977? Is that rental in 1977 or --

A. That's the total income less expenses. In other words, the net income we applied, 19.5 percent of the total expenses and running the building.

Q. Against, after deducting income?

A. Right.

Q. Because you --

A. That's the net.

Q. In other words, there was some income from the building because your rent is paid?

A. Right; right.

Q. What about Item 39, the O'Hare building? What is the difference between that and the building we have just been talking about?

A. The O'Hare building -- that's a department and that consisted of three employees and those three employees handled all the tenant leases and they handled the repairs to the building, the maintenance, and obviously an overhead service **[901]** essential to the functioning of the Brotherhood and I allocated 19.5 percent.

THE COURT: The same as the other expenses of the building?

THE WITNESS: Right.

BY MR. SILARD:

Q. In making these allocations, was there a space analysis available to you that you used?

A. Yes. I had a diagram of the sixth and seventh floor which is occupied by BRAC and I also had the total square footage of the building and so then when I marked off the total footage of the floor space occupied by Paragraph 22 activities, I was able then to reach the calculation of 19.5 percent.

Q. Where did you get the space analysis or building plan from?

A. Well, it had been given to the company, United Dairy, that bought our building, but I went downstairs and got if from them in order to make this calculation.

Q. It was a plan that was created to be given to the purchaser of the building in 1977?

A. That's correct.

Q. You retrieved it from them in making your analysis?

A. That's correct.

* * * *

DIRECT EXAMINATION

[909] BY MR. RAUH:

Q. Mr. Bobo, turning now to the October 6th, 1975 rebate plan, how was that adopted?

A. At that time, I was on the Executive Council, I was the International Secretary-Treasurer, and the Executive Council held a special meeting on October 5, 1975, for the purpose of discussing and hearing the recommendations of Attorney Joe Rauh. We had asked him to make recommendations for a revised dues rebate plan.

And we held that discussion on October 5. We gave tentative approval to the plan, pending Mr. Rauh's going to court the following day and then returning for another special meeting when we would make the final determination.

[910]And on October 6th, when Attorney Rauh returned, we had another special meeting, and that meeting we again discussed his recommendations, and following considerable discussion, we approved his recommendations unanimously.

THE COURT: I suspect during that discussion my name was taken in vain several times.

BY MR. RAUH:

Q. You said you approved the recommendations unanimously.

A. Yes, we did. Unanimously.

Q. And was everybody on the Executive Council there at these two meetings?

A. Yes. The full Council was there and it was a unanimous opinion, or decision. I, myself, speaking personally, wanted to see a good and fair plan. I felt like that we should make an honest effort to be probably --maybe have the best plan of any union, and in spite of the fact that many of these recommendations of Attorney Rauh's actually involved activities that we thought should have been considered as collective bargaining, we accepted his recommendations in order to have what we considered the best plan available to any union.

Q. Now, how was the plan, after it was adopted, published, Mr. Bobo?

A. It was published in the next issue of the Railway Clerks Interchange in November of 1975.

Q. And to whom did that Interchange go?

[910-A]A. That magazine went to the entire membership, including the agency fee payers.

* * * *

[951] BY MR. MERRILL:

Q. Do you recall ever discussing that case, sir?

A. I was elected to the Executive Council in 1972 so obviously I was not there for that meeting.

Q. Were there some members of the Executive Council who resisted the modification of the Policy Statement rebate during that October 5, 1975 meeting?

* * * *

THE WITNESS: There was considerable discussion. In **[952]** particular, in the areas of the fact that in our opinion there were so many activities that we were charging to the rebate that we knew positively did involve some collective bargaining but we were all in agreement, total agreement,

that we wanted to come up with the best plan possible and we all concluded that the recommendations of Joe Rauh were the best, and probably the best of any union, and I would venture to say that today we have the best rebate program of any union.

* * * *

[960]Q. Now, would you describe your job as staff for the Board of Trustees?

A. Yes. In my job as staff for the Board of Trustees, I am responsible for receving from the Local Lodges and the **[961]** System Boards and from the Grand Lodge the various RP reports, Lodge rebatable reports and the Grand Lodge rebatable information and I exclusively work for the Board of Trustees while I'm performing these duties.

Q. No one has ever given you any instructions other than the Board of Trustees in regard to this problem?

A. No, sir.

Q. Now, could you describe how you went about getting the information in for the Board of Trustees for the 1977 rebate program which came out in '78?

A. Yes.

In September of 1977, Mr. Ed Reynolds, recording secretary at the Board of Trustees, suggested that we contact all of the various Local Lodges advising them that the political education program, PEP, is to be considered as rebatable and this recommendation by the Board of Trustees was made to Mr. Bobo in that letter of September, 1977.

Mr. Bobo then assigned me to handle this information for the Board of Trustees and in October of 1977 our first attempt to gather the information from the various Locals and System Boards was attempted and it was an undated letter. The date it was mailed was the latter part of October, 1977, and this was our first attempt to receive the rebatable information from the Local Lodges and the System Boards.

Q. That went to all Local Lodges and System Boards back **[962]** in October of '77?

A. All Local Lodges and System Boards, U.S. and Canada.

Q. All right. Did all the reports come in as a result of the October '77 letter?

A. Well, unfortunately, prior to year's end we started receiving rebatable reports and the recording period had not expired so we immediately had to contact these lodges, again advising them of the policy and as these reports were received, we contacted these Local Lodges again updating the information to them in regard to the BRAC rebate policy, and a significant number of these reports remained outstanding through March 1978.

Q. Then what did you do in March of '78 as to the ones that hadn't sent in their reports?

A. In March of 1978 another letter was written. This time it was sent to those lodges, U. S. and Canada, and those System Boards, U. S. and Canada, who had not as yet forwarded the necessary information required for the completion of the 1977 rebatable form.

* * * *

[974]Q. Now, how was the amount for the Grand Lodge on political expenditures calculated, Mr. Farrell, please?

A. Well, the figures for the Grand Lodge were calculated by using the Brotherhood's own accounting system.

Q. What do you mean by that? How they could use the Brotherhood's own accounting system. Could you explain that, please?

A. Yes.

The rebatable plan brought about certain changes in the Brotherhood's accounting procedures as Mr. Howard discussed earlier and one of those changes implemented the use of the expense account in order to determine rebatable time spent by Grand Lodge employees on rebatable items, and in those instances the time as well as the expenses are readily gotten off the various expense accounts of Grand Lodge employees.

Q. And those are fed into the computer and are recoverable that way?

A. Yes, they are coded with AR, and we merely have to run the program at the end of the year to retrieve this information.

Q. Now, in regard to time spent and expenditures, was there any fringe benefits applied to the hourly rate?

A. Yes, there were, Mr. Rauh.

Q. What was the rate of the fringe benefit applied to the [975] hourly rate?

A. The fringe benefit rate was determined to be thirty-five percent and for the year 1977, this figure was applied to both the salary and expenses and we felt that we were again overly generous in determining the Grand Lodge rebatable as far as the salary and fringe for the year 1977.

Q. This is because the fringe was applied not only to the salary but to the expenses?

A. That's correct, Mr. Rauh.

Q. Now, just to quickly complete the materials that were provided, when you added up the Local Lodge rebatables, the System Board rebatables, and Grand Lodge rebatables, how did you get the percentage of rebatable dues?

A. The BRAC rebatable policy is based on a net dues income figure and in order to determine the other half of the factor for determining a rebate, we had to determine the net income of the various units of BRAC again for the year 1977 and this was determined by using lodge audits, except in those twenty cases where I explained that I had to calculate those net dues for those twenty lodges when the audit was received.

We did receive audit reports from all of the System Boards and those figures were used for all of the System Boards and System Divisions.

Q. And how did you get the net dues figure for the Grand Lodge?

[976]A. That was gotten off the Brotherhood's profit and loss statement for the year 1977.

Q. And the figure for 1977 percentage was --

A. Based on a three-year average, the 1977 rebatable percentage was determined by the Board of Trustees to be 5.4 percent.

Q. When you say was determined, that was really only an arithmetic determination once you had determined what the rebatables were, and the dues were; is that correct?

A. That's correct, Mr. Rauh.

Q. And for '76, what was the percentage?

A. 4.9 percent.

Q. That was higher than '75?

A. '75 was determined to be 4.68 percent. However, when the 1976 rebate was processed, it was agreed upon that if '76 was higher than '75, we would retroactively apply to the previous years the higher percentage and in those --

Q. So 4.9 has been paid to every person back to the date of protest and 5.4 was paid for '77?

A. That's correct.

Q. Was the method used in '76 or that is, in the spring of '77 or '76, substantially the same?

A. Yes, they were, Mr. Rauh.

Q. Now, directing your attention to these large charts, I was going to say I think you are the last witness on this, but [977] there is one item that may be Mr. Robinson's. I'm not sure, but I think maybe he will complete all of the items.

Directing your attention now, can you see that all right, Mr. Farrell. That is Attachment V.

Do you have Attachment V?

A. Yes; I'd rather use my sheets here.

Q. Let's take Item 1, the international president. There's an F on that whole row which means that you are the primary producer of those figures.

What does the figure, $3,162.27 in the column rebated for international president represent?

A. That rebated figure for International President Kroll represents his time, traveling expenses, plus thirty-five percent fringe applied to both the time and travel expenses for the year 1977.

THE COURT: That was shown on his rebatable form?

THE WITNESS: That was shown on various documents of our Grand Lodge. We pulled it off the GLL-044.

BY MR. RAUH:

Q. But those were pulled off the rebatable form?

A. Yes.

Q. Excuse me. Maybe you are confusing --

They were pulled off time expenditures reports?

A. That's correct. As they expended the time on rebatable activities, Grand Lodge personnel report the time immediately **[978]** throughout the various year. In the case of the Lodge and System Board, we have to retrieve it after the time has gone by.

THE COURT: That's the same with all the rest of those figures in that column, rebated column?

THE WITNESS: Yes, on Page 1, that is true.

BY MR. RAUH:

Q. I think his Honor's question is: Is that true for everything up through all the officers?

A. That's correct.

Q. In other words, it is their time plus their expenses plus thirty-five percent of both.

A. That's correct.

Q. Now, directing your attention to Item 16, the Board of Trustees, that is the one that Mr. Robinson is going to testify to. I knew there was one, sir, so we will pass that.

Going then to Item 17, the industry relations branch or division, there is an item of one thousand eight O four two two. What does that represent, Mr. Farrell?

A. That figure represents time, traveling expenses, plus thirty-five percent for employees of the industrial relations department and in the case of staff, they very well might attend a PEP meeting throughout the year at which time their time at that meeting during regular working hours would be rebatable.

In the case of the clerical help, I would say that any **[979]** employee of the Grand Lodge could at any given time be requested to perform various duties which may very well be rebatable. For instance, our telephone receptionist may be required to stuff envelopes at any given time during the year.

Q. Stuff envelopes for what purpose?

A. Particularly if they would be for expenditures or anything regarding the RCPL. That time would be totally rebatable as would the mail clerk, if they would again stuff envelopes and, in general, any employee of the Grand Lodge could at any given time be requested to perform these duties.

Q. And they would be reported and they would be added on thirty-five percent plus that would go into the records of the Grand Lodge?

A. Right.

In the case of clerical help, we're speaking almost one hundred percent of salary plus thirty-five percent fringe.

In the case of the staff and officers, of course, traveling, the expenses would be included in their figures.

Q. That would be true of the 19 and 20, International Affairs Research and Education?

A. That's true, Mr. Rauh.

Q. Directing your attention to Paragraph 28, there's a very large item there for rebatables under professional services. Can you remember what that is for, Mr. Farrell?

A. That particular rebatable expenditure of $12,000 **[980]** represents payments to a consultant, among others, Maurer, Fleisher, Zon and Anderson.

Q. Who is Maurer, Fleisher, Zon and Anderson?

A. They are public relations experts and they might have been employed at some time throughout the year regarding our public relations work for our legislation or other purposes which are rebatable.

Q. That was rebatable in full, the Maurer, Fleisher bill?

A. That's reflected on our pull-offs of GLL-044.

Q. You refer to GLL-044. That's the same document as Exhibit CR.

I will show it to you and see if this is what you are referring to as GLL-044 in evidence as CR.

A. That is correct, Mr. Rauh.

Q. Directing your attention to Item 30, administration, there is a large item there, too, for eight thousand O four three forty-six. What does that represent, Mr. Farrell?

A. Category No. 30 is headed administration. Specifically, that refers to the international president administration, a member of this is the staff assistant by the name of Betty Hidey.

[981]Q. Now, why did Miss -- what did Miss Hidey do?

A. Among other things, Miss Hidey handles the RCPL books and works in conjunction on the PEP Program, and since a high proportion of her time is devoted to these projects, she naturally would have a large amount of rebatable salary, and if she travels, expenses.

And that would represent for clerical help staff, various employees, again we are talking about time, fringe benefits, figured at 35 percent.

Q. Dropping down now to the international secretary-treasurer, there's a figure of rebatables, 1,104.57. What would that represent?

A. That figure would represent Mr. Don Bobo's rebatable time, expenses, and fringe benefits for the year 1977.

Q. And the next item, 36, data processing, also has 1,400. What is that?

A. Well, at various times throughout the year, as RCPL money is received, the data processing department would have a key-punch clerk work for Miss Hidey to account for the RCPL funds, and as that particular clerk would spend time key-punching these checks into the particular RCPL account, that time would be rebatable, as would 35 percent fringe applied to that particular salary or expense figure.

Q. I notice that the next item, 37, comptroller, is a rather high item for rebate, being 3,701.07. Could you tell us **[982]** what that represents.

A. Yes. That figure would represent mainly two people who work for Betty Hidey. One is a Miss Sandy Hensley, who would devote a high proportion of her time helping Miss Hidey, and another clerk, Sandy Newberry, who has duties in addition to her key-punching duties. And they would fall into the category of controller, and the time she devotes to Miss Hidey again would result in that relatively high figure of 3701.07. That represents time, expenses, plus 35 percent fringe.

Q. Turning now to Item 38, reproduction and switchboard, smaller items now. The rebatable is 179.24.

A. This item again would represent employees' time and expenses plus fringe benefit of 35 percent. However, these particular people, I doubt if they would have performed duties on the road, so we're

probably just talking about salary and 35 percent fringe benefit there.

Q. That would be true of 39, 40, 42, 43?

A. Yes. That's correct regarding those items.

Q. Turning now to Item 53, office expenses of 2,558.79. What would that represent in rebatables, Mr. Farrell?

A. That would mainly represent computer time that was devoted to printing labels and other expenses. We have mailing packages, say, labels, express. Then we have the rent on the equipment, as well as printing and office supplies for the computer forms that are used in rebatable activity.

[983]Q. With respect to 54, membership services, where the rebatables are listed as 3,525, what does that represent, Mr. Farrell?

A. That would represent the scholarship, specifically the Frank Hall Scholarship and the Harvard Scholarship, which basically is for advising union officials on the ways of collective bargaining and various items there. And those amounts are treated as 100 percent rebatable.

Q. Now, this is largely what is known as the Frank Hall Scholarship. That is a Canadian payment to a Canadian --

A. Yes. Frank Hall, as I understand it, was a prominent Canadian and a scholarship fund was set up in his name.

Q. And that's paid to a Canadian institution of some kind?

A. Yes, sir.

Q. Turning now to IV, Item 56, general fund and other expenses, 36,173. What does that represent, Mr. Farrell?

A. That figure represents a couple of items. For instance, it represents $23,796.39 of donations.

Q. Donations to whom?

A. Various political contributions and various charitable contributions. So there are two types of contributions there; political and others are charitable.

Q. And that was 23,000 of it. What would the remaining thirteen of it be?

A. Well, banquets and luncheons would account for $9,015.08. **[984]** And foreign travel in the amount of 3289.26 would result in that figure, totaling $36,173.

Q. Turning now to legal, No. 57, there's a 70,000 figure. What does that represent?

A. That figure, among others, would include Mr. Hirsh's rebatable time and expenses and fringe, plus the other general counsel, Mr. William Donlon, D-o-n-l-o-n, his time.

Additionally, it would include $13,800 of labor affiliation with the Canadian Railway Labor Association, and additionally there were $55,732.11 of legal bills which dealt with ICC, CAB, and other various rebatable activities.

Q. Where you had a legal bill for either legislative activity or ICC or CAB, they were all treated as rebatable.

A. Yes, they were.

Q. Dropping down now to 60, labor affiliation, the whole amount was treated as rebatable.

A. Yes, that is correct.

Q. Now, the death benefit, there's 586.32 there. What would that represent?

A. That figure for the death benefit would represent, again, clerical help who at any given time during the year are required to perform duties which may involve stuffing of envelopes and that type, then would be charged as rebatable. Plus 35 percent fringe to that figure.

Q. Drawing your attention to 63, organizing, the rebatable [985] figure is 5,647.80. What would that be?

A. That figure for the organizing department is largely attributable to a Mr. Dennis Lockhart, and Dennis is a black organizer, and, in fact, he's our only black organizer. And we use him in various political activities and dealing with NAACP, or whatever.

And at those times that he is called upon to perform those duties, his time is rebatable, and since he is it in that respect, he has quite a large amount of rebatable time and expenses.

Q. Plus 35 percent.

A. Plus 35 percent fringe.

Q. Now, turning to the next item, 64, official publication. There's a rather large item for 11,136.44. What is that?

A. That figure would represent the employees, again staff and clerical, as they perform rebatable time. Plus fringe benefits of 35 percent on both their salary and expenses.

And in addition, we're talking about the per-page calculations that rebatable activity may appear in the Railway Clerk Interchange or the International President's Bulletin, and Miss Diane Curry, who heads that department, would allocate the per-page characters devoted to rebatable time and to rebatable as that particular area of a page relates to the entire characters on that page.

Q. And the last item, legislative, is a full amount.

[986]THE COURT: It speaks for itself.

MR. RAUH: Yes. Thank you, sir.

THE WITNESS: Yes.

* * * *

(Caption omitted in printing.)

TRANSCRIPT OF PROCEEDINGS
August 10, 1979

* * * *

[1103]MR. RAUH: Objection, your Honor. The policy statement of October, 1975 has repaid every dime to every employee who protested under the new program. The proper accounting under the old program is totally irrelevant.

THE COURT: I think that's right, Mr. Merrill.

MR. MERRILL: Your Honor, I haven't asked him about the proper accounting under the program. And instead of stating an objection, we have repetitious testimony from Mr. Rauh, who's simply covering the background and the knowledge of the witness.

MR. RAUH: I've read the affidavits about previous political programs.

THE COURT: It certainly refers only to things before the October 6th change; isn't that right, Mr. Merrill?

MR. MERRILL: That is correct, your Honor. However, --

THE COURT: And isn't it true that after that adoption of the October 6th change, that they went back and re-refunded under the new system?

MR. MERRILL: However, the new system adopted many features of the old.

THE COURT: Well, are you claiming that any substantial political expenditure, straight political expenditure, has not now been refunded?

MR. MERRILL: I have no basis to make that claim, your Honor. We don't have that information.

THE COURT: Well, --

* * * *

(Caption omitted in printing.)

APPENDIX II TO DEFENDANTS' POST-TRIAL REVIEW

Index to Testimony on Defendants' Exhibits B and C

	Line No. & Category	Function & ¶22 Allocation	Cost	Amount Rebated
1	Internat'l Pres.	28-30	777	977-78
2	IVP Coleman	30-32	777	977-78
3	IVP Devlin	32-33,60	777	977-78
4	IVP Fitzgibbon	33-34	777	977-78
5	IVP Granlund	34	777	977-78
6	IVP Kilroy	34	777	977-78
7	IVP Kroll	35,61	777	977-78
8	IVP Lynch	35	777	977-78
9	IVP McGregor	35-36A	777	977-78
10	IVP Neal	36	777	977-78
11	IVP Otero	37,61	777	977-78
12	IVP Toppen	37-38,62	777	977-78
13	Ass't IVP Bishop	38	777	977-78
14	Ass't IVP Norton	38	777	977-78
15	Ass't IVP Smith	38	777	977-78
16	Board of Trustees	39,1057	777	1011-12
17	Industry Relations	39-41,904-06	777-78	978-79
18	Social Insurance	42,778,810	777-78	
19	Internat'l Affairs	42	777-78	979
20	Research & Education	43-44,907-08	777-78	979
21	Railroad Patrolmen	44	777-78	
22	REA O'Hare	778-79,810	777-78	
23	Nat'l Negotiating Committee	45	777-78	
24	Canadian Negotiating Committee	45	777-78	

	Line No. & Category	Function & '22 Allocation	Cost	Amount Rebated
25	Harvard trade union courses	45-46	777-78	
26	Manpower Training	46	777-78	
27	Int'l President's Bulletin	47	777-78	
28	Professional Services	48-49	777-78	979-80
29	Membership protective	779,810	777-78	
30	Administration	49	779	980-81
31	Washington office	49-50	779	49-50
32	Philadelphia office	50-51,63	779	
33	Montreal office	51,779-80	779	
34	Canadian Exec. Council	51	779	
35	Internat'l Sec-Treas.	883-84,891-93	779	981
36	Data Processing	780-81	779	981
37	Comptroller	781,811	779	981-82
38	Reproduction & Switchboard	886	779	982
39	O'Hare Building	901-03	779	982
40	Administration-IST	884-85,895	779	982
41	Audit & Bonding	886-87	779	
42	Auditors	888-89	779	982
43	Per Capita Tax	889-89A	779	982
44	Cashier	896	779	
45	Annuities	51-53	779	
46	Transfer Allowance	781-82,811	779	
47	Separation Allowance	53	779	
48	Pension Prior Service Funding	782,811	779	
49	Auto expenses	782-83	779	

	Line No. & Category	Function & §22 Allocation	Cost	Amount Rebated
50	Building expenses	900-03	779	
51	Depreciation	783-84	779	
52	Insurance	784-85	779	
53	Office expenses	785-89,811-11A	779	982
54	Membership services	789	779	983
55	Fidelity Fund	889	779	
56	General Fund -- other expenses	789-91,800	789-91	983-84
57	Legal	791-94	791-94	984
58	State Leg. Rep.	798-99	798-99	
59	State Legislative	795	795	
60	Labor Affiliations	53	795	53,984
61	Convention	54,63-64	795	
62	Death Benefit	54,64	796	64,984
63	Organizing	54-55	796	984-85
64	Official Publication	55-56,64	796	985
65	Disaster Relief	56	796	
66	Legislative	57	796	57,985-86

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N **APPENDIX TO DEFENDANTS' REPLY MEMORANDUM**

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS EXPRESS AND STATION EMPLOYEES, et al.,
Defendants.

* * * *

[39]94. Plaintiffs' brief, p. 31, lines 22-24 alleging "the union's participation in an unlawful laundering scheme creating covert political contribution funds."

Inasmuch as the activities cited funneled voluntary political donations into general, politically restricted funds -- to plaintiffs' benefit -- plaintiffs' assault is both untrue and irrelevant as without fiscal significance. We do not understand why plaintiffs insist on repeating this statement since we long ago refuted it without contradiction (see defendants' Reply Memorandum in Support of Motion for Entry of Final Order, filed December 19, 1977, p. 4 n. 2).

* * * *

(Proof of service omitted in printing.)

(Caption omitted in printing.)

TRANSCRIPT OF PROCEEDINGS
October 23, 1979

* * * *

[1326] MR. RAUH: Yes; that's right. It didn't affect the accounting here at all and I won't waste the time on the answer.

I have to answer some of these things because there's a good name problem for the union, too. There was a reference to laundering funds and your Honor recalls at an earlier date, but I think your Honor didn't recall that there was anything wrong in what was done. There was an exchange of funds with the AFL-CIO. BRAC had some voluntary funds and they exchanged it for dues money. Actually they helped the plaintiffs because there was more dues money in there and less--you could use the voluntary money for political expenditures and you can't use dues monies. AFL-CIO wanted voluntary money so BRAC gave it to them and they took back dues money so actually they had more money for the purposes of the dues and that word "launder" has been used on this transaction but it's an exchange in funds, if you **[1327]** want to say it that way, but there's nothing wrong with it. It seems to me it was to their advantage.

* * * *

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SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

Civil No. 73-113-N
Consolidated with
Civil No. 73-118-N

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ALLEN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Defendants.

These consolidated actions came on for further trial on August 1, 1978, before the Honorable Leland C. Nielsen, U. S. District Judge, sitting without a jury. The plaintiffs were represented by Michael E. Merrill, Esq., Raymond L. LaJeunesse, Jr., Esq., and Hugh L. Reilly, Esq. The defendants were represented by Joseph L. Rauh, Jr., Esq., John Silard, Esq., Mary M. Levy, Esq., and Solomon I. Hirsh, Esq. The Court having heard and considered the

evidence, both oral and documentary, the arguments of counsel, both oral and written, and now being fully advised, makes the following Findings of Fact and Conclusions of Law:

1. On January 21, 1976 this Court issued Findings of Fact, Conclusions of Law and an Interlocutory Summary Judgment on the liability issues, which judgment together with amendments of April 14, 1976, and November 29, 1976, are incorporated herein as if set forth at length.

2. On April 14, 1976, the Court certified its Interlocutory Summary Judgment for appeal, but the Court of Appeals denied hearing on said certification June 7, 1976.

3. The Findings of Fact and Conclusions of Law and the Interlocutory Summary Judgment were the framework for the trial commencing on August 1, 1978, as the pretrial order provided that these findings and conclusions "are conclusive and shall not be subject to challenge or supplementation by evidence or legal argument at the trial."

4. On October 6, 1975, BRAC adopted a rebate plan encompassing all political and legislative expenditures of the Grand Lodge and subordinate units, as well as all ideological expenditures and all dues and contributions to other labor federations, organizations and charities. That plan is a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963). The Grand Lodge Board of Trustees annually computes political-ideological rebates due to any protesting dues payer for the prior calendar year. These are computed on the basis of forms submitted by subordinate units and upon reports of political time and expenditures by Grand Lodge personnel which are contemporaneously logged on the Grand Lodge computer system throughout the calendar year. Any employee who believes his rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals. Members of the Board include former Governor Edmund G. Brown, Dame Soia Mentschikoff and Reverend Preston Bradley.

The Board of Trustees' computation for calendar year 1975 disclosed that 4.68% of the Union's total income from dues and fees had been expended for items included in the rebate plan, and each plaintiff in this suit was sent a refund check for that proportion of his 1975 dues

payment, as well as for each earlier year back to the date of his initial dues protest. The rebate computation for 1976 was 4.9%, and each plaintiff was then sent that amount for 1976 plus the amount necessary to increase to 4.9% the rebate for each prior year since his protest. Plaintiffs have also been sent their rebates for 1977, amounting to 5.4% of their dues payments in that year. No plaintiff has appealed to the Public Review Board, although each has been advised of his right of appeal.

5. On the basis of the above finding, the Court concludes that plaintiffs' rights in the political-ideological area have been vindicated by the rebates they have received and are protected for the future by the rebate plan.

6. With respect to the area of expenditure defined in Paragraph 22 of the Interlocutory Summary Judgment, pre-1976, based upon defendants' stipulation, each plaintiff is awarded with interest his entire dues payment made or transmitted to the Grand Lodge from the date of his initial protest through December 31, 1975.

7. For calendar year 1976 each plaintiff is awarded with interest a return of 40.0% of his dues paid to the Grand Lodge.

8. For calendar year 1977 each plaintiff is awarded with interest 37.8% of his dues paid to the Grand Lodge in 1977.

9. These awards for 1976 and 1977 are based upon trial exhibits B and C and the supplements thereto, which the Court finds to have been supported by a preponderance of the evidence.

10. To comply with the requirements of the Railway Labor Act, defendants shall establish a system that reduces the dues payment obligation to the Grand Lodge of any plaintiff for each calendar year by the proportion of Grand Lodge expenditures determined by defendants to have been spent for Paragraph 22 functions and the rebates in the political-ideological areas in the preceding calendar year. To determine the annual reduction amount, defendants shall at once integrate Paragraph 22 data into the regular accounting records of the Grand Lodge which are subject to independent annual audit, and as concerns compensated time of officers and staff, such records shall be kept on the basis of a time study or other investigation establishing generally accepted accounting standards for allocating the compensated time and expenses of Grand Lodge personnel who engage in Paragraph 22 activity.

11. The testimony of the Local Lodge defendants and examinations of their books and records established by a preponderance of the evidence that the Locals engage in almost no Paragraph 22 activity and incur only minimal expenditures in Paragraph 22 areas other than political contributions and expenses which are already a part of the rebate plan. Upon the stipulation of the defendants, each plaintiff is awarded a return of $1.00 per year from dues paid to his Local Lodge from the date of his original protest through 1977 and in each calendar year thereafter.

12. Testimony by officers and employees of defendant System Board and examination of the books, records and other exhibits establish by a preponderance of the evidence that, with the exception of the years 1975 and 1976, the System Board engages in little Paragraph 22 activity. Only minimal sums are spent on such activity, except items already rebated to the plaintiffs. Therefore, each plaintiff is awarded the sum of $4.14 per year from the System Board for the year 1975 and a similar amount for 1976, and upon stipulation of the defendant, each plaintiff is awarded a return of $1.00 per year from the date of his original protest through 1977 and each calendar year thereafter, except for 1975 and 1976.

13. The costs of defending this litigation are not a Paragraph 22 expenditure.

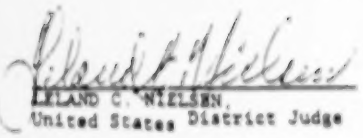
14. Plaintiffs are entitled to no return for any alleged waste on the part of defendants.

15. Upon stipulation of the defendants, strike benefits shall be paid to agency fee payers equally with regular members with no requirement being imposed upon such persons or any other plaintiff other than that of refraining from working for Western Airlines during the time for which said benefits are paid.

16. The plaintiffs shall recover the share of their dues allocable to the death benefit fund and will no longer be required to pay same, but shall be deemed to have waived any rights or benefits under that fund.

17. The plaintiffs are entitled to their costs of suit.

Dated: March 14, 1980.



LELAND C. NIELSEN,
United States District Judge

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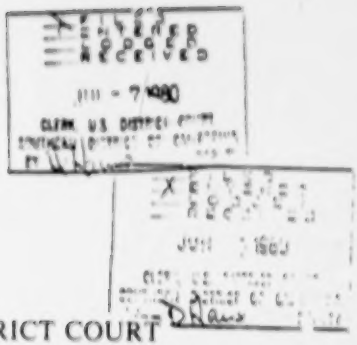

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	Civil No. 73-113-N Consolidated with Civil No. 73-118-N
ALLEN FAILS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	**JUDGMENT**

In accordance with the Findings of Fact and Conclusions of Law entered by this Court on March 14, 1980,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Each plaintiff is awarded the sum next to said plaintiff's name in Attachment A hereto for expenditures made by defendants on the activities set forth in Paragraph 22 of the Interlocutory Summary Judgment (other than

expenditures which are already a part of the political-ideological rebate plan adopted on October 6, 1975) for the period from the date of initial protest through December 31, 1977.

2. For the period from January 1, 1978, to date of Judgment, each plaintiff is awarded, with interest, a sum equal to said plaintiff's share of the expenditures made by defendants on Paragraph 22 activities (other than expenditures which are already a part of the political-ideological rebate plan adopted on October 6, 1975).

3. Defendants are directed to establish a system that reduces the dues payment obligation of any plaintiff for each calendar year by $2.00 per year plus the proportion of Grand Lodge expenditures determined by defendants to have been spent for Paragraph 22 functions and the rebates in the political-ideological areas in the preceding calendar year and to determine the annual reduction amount for the Grand Lodge in accordance with the provisions of Paragraph 10 of the Findings of Fact and Conclusions of Law of March 14, 1980.

4. As stipulated by defendants, strike benefits shall be paid to agency fee payers equally with the regular members with no requirement being imposed upon such persons or any other plaintiff other than that of refraining from working for Western Airlines during the time for which said benefits are paid.

5. Since each plaintiff is awarded a recovery of the share of their dues allocable to the death benefit fund under Paragraphs 1 and 2 hereof and will no longer be required to pay same under Paragraph 3 hereof, plaintiffs shall be deemed to have waived any rights or benefits under that fund.

6. Plaintiffs are entitled to their costs of suit.

7. Defendants having repeatedly made clear their intention to appeal this Court's ruling in the Interlocutory Summary Judgment that all expenditures made by defendants on Paragraph 22 activities fall outside the area of collective bargaining and this Court having determined that this is a controlling and important question of law not yet settled by the appellate courts, this Judgment is stayed until final appellate review herein

upon the condition that defendants present to this Court, within 10 days, and this Court approves, an appropriate supersedeas bond.

7-7-80

DATED

LELAND C. NIELSEN
UNITED STATES DISTRICT JUDGE

Approved as to form:

Michael E. Merrill
Attorney for Plaintiffs

Joseph L. Raun, Jr.
Attorney for Defendants

ATTACHMENT A TO JUDGMENT

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Pamela Balian	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Shirley Ballard	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Candice Brown	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Janis Damante	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Nancy Dean	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Marguerite Douglas	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Joyce Emminger	7	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Howard Ellis	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
G. Brent Erkman	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Allen Fails	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Noel Fontaine	11	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jack E. Frost	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Mary Grote	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Twila Johnson	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Sally Loudin	15	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Gayle Nelson	16	25.20	.50	.50	50.40	1.00	1.00	4.20	.08	.08	-	-	-
Helene Taylor	17	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
								50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	22.88	.92	3.80	25.63	1.00	1.00	102.64	349.41	21.67	327.74
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	22.88	.92	3.80	25.63	1.00	1.00	102.64	349.41	21.67	327.74
4	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
5	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
6	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	24.96	1.00	4.14	15.80	.58	.58	100.88	339.48	21.67	317.81
10	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
11	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
12	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
13	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
14	24.96	1.00	4.14	21.02	.83	.83	102.24	346.56	21.67	324.89
15	-	-	-	-	-	-	42.86	125.82	9.69	116.13
16	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
17	12.48	.50	2.07	-	-	-	92.27	298.86	21.67	277.19

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Ray Sauls	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Phyllis Payne	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Audrey Ryan	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Kenneth Wisor	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Loa Young	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Susan Allen	6	-	-	-	-	-	-	-	-	-	31.20	.50	2.07
Andrea Anixt	7	16.80	.33	.33	50.40	1.00	1.00	50.40	1.00	1.00	15.60	.25	1.04
Donald Bakanec	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Gayle Baxter	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Twanet Bender	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Bonita Rupp Biagi	11	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Deanna Birkel	12	-	-	-	-	-	-	-	-	-	26.00	.42	1.73
Andrea Bowman	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Kaylynn Brown	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Kyra Canty	15	-	-	-	-	-	-	25.20	.50	.50	55.40	1.00	4.14
Jay Carter	16	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Edwina Char	17	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
4	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
5	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
6	24.96	1.00	4.14	25.63	1.00	1.00	28.47	119.97	3.31	116.66
7	18.72	.75	3.11	25.63	1.00	1.00	79.88	269.24	15.96	253.28
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
10	12.48	.50	2.07	-	-	-	92.27	298.86	21.67	277.19
11	20.80	.83	3.45	25.63	1.00	1.00	101.88	346.13	21.67	324.46
12	24.96	1.00	4.14	25.63	1.00	1.00	25.34	112.22	1.33	110.89
13	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
14	12.48	.50	2.07	25.63	1.00	1.00	98.82	333.04	21.67	311.37
15	24.96	1.00	4.14	25.63	1.00	1.00	49.30	193.77	9.43	184.34
16	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
17	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
James Christensen	1	25.20	.50	.50	50.40	1.00	1.00	46.20	.92	.92	-	-	-
Vandee Clark	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Bettye Connor	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Colleen Cosgrove	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Ronald F. Covalsky	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Derlie Gates Craver	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Joan W. Crittenden	7	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Anita P. Davis	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Victoria Falger	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jacquelyn B. Fretwill	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jean Fucak	11	25.20	.50	.50	29.40	.58	.58	-	-	-	-	-	-
Lynn Bartlett Fukuda	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Claire Green	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jeanne Flood Harris	14	25.20	.50	.50	50.40	1.00	1.00	42.00	.83	.83	34.40	.58	2.42
Linda E. Harvey	15	12.60	.25	.25	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Johnny Heard	16	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Mary K. Hess	17	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	-	-	-	-	-	-	62.91	189.55	14.79	174.76
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	24.96	1.00	4.14	21.70	.88	.88	102.44	347.54	21.67	325.87
4	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
5	6.24	.25	1.04	-	-	-	89.96	289.03	21.67	267.36
6	16.64	.67	2.76	1.97	.08	.08	94.31	308.05	21.67	286.38
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
8	24.96	1.00	4.14	13.83	.50	.50	100.38	336.85	21.67	315.18
9	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
10	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
11	-	-	-	-	-	-	30.20	86.96	6.63	80.33
12	22.88	.92	3.80	25.63	1.00	1.00	102.64	349.41	21.67	327.74
13	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
14	24.96	1.00	4.14	16.75	.75	.75	88.59	296.60	14.28	282.32
15	24.96	1.00	4.14	25.63	1.00	1.00	96.19	332.36	20.14	312.22
16	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
17	18.72	.75	3.11	25.63	1.00	1.00	101.11	342.86	21.67	321.19

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Pam Hill	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Elizabeth Hohndorf	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Christine Holme	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Kenneth Johanson	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Susan Kealoha	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Connie Kearney	6	-	-	-	12.60	.25	.25	50.40	1.00	1.00	55.40	1.00	4.14
Emelda W. King	7	21.00	.42	.42	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Mildred A. King	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Vicky Lee	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Wafik Loutfi	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jack Lyons	11	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Colleen Magorty	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Lilyane Messioux	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Lynn Michaelson	14	4.20	.08	.08	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Retta Jackson Moen	15	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Dana Mount	16	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Joan Mullen	17	25.20	.50	.50	50.40	1.00	1.00	33.60	.67	.67	-	-	-

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
4	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
5	18.72	.75	3.11	21.02	.83	.83	99.96	336.76	21.67	315.09
6	24.96	1.00	4.14	25.63	1.00	1.00	68.67	252.44	14.38	238.06
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	324.74
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
10	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
11	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
12	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
13	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
14	24.96	1.00	4.14	25.63	1.00	1.00	91.37	318.80	19.12	299.68
15	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
16	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
17	-	-	-	-	-	-	57.11	170.65	13.26	157.39

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Barbara Nauert	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Norma Evind Newburn	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Mildred O'Neill	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Michael G. Pagano	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Kathy Perry	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Joanne R. Pettit	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Doris Piunno	7	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Evelyn Postlewaite	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Lionel A. Powell	9	25.20	.50	.50	50.40	1.00	1.00	33.60	.66	.66	-	-	-
Dinnis Richert	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
James Roberts	11	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	12.60	.25	1.04
Judith Salazar	12	25.20	.50	.50	29.40	.58	.58	-	-	-	-	-	-
Julitta Selinger	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Sandra O. Shaughnessy	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Bonnie Simmons	15	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Karlyne A. Sparks	16	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jan Sudjian	17	-	-	-	42.00	.83	.83	50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	5.28	1.00	-	4.99	1.00	-	91.01	294.82	21.67	273.15
4	16.64	.67	2.77	25.63	1.00	1.00	100.35	339.60	21.67	317.93
5	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
6	24.96	1.00	4.14	5.90	.25	.25	98.39	326.43	21.67	304.76
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	-	-	-	-	-	-	57.11	227.74	13.26	214.48
10	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
11	-	-	-	-	-	-	70.10	214.99	16.83	198.16
12	-	-	-	-	-	-	30.20	86.96	7.65	79.31
13	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
14	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
15	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
16	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
17	24.96	1.00	4.14	25.63	1.00	1.00	84.45	298.78	17.59	281.19

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Kenneth Tong	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
J. K. Weberg	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Margaret Weir	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Cheryl M. White	4	-	-	-	21.00	.42	.42	50.40	1.00	1.00	55.40	1.00	4.14
Kathy Wilkes	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Marvilyne Williams	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Karen N. Wilson	7	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Leo C. Withers	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jean Wong Penn	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
May Yee	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Dessa Reiko Yukawa	11	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Henry Adams	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jesus J. Anaya	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Edward A. Anderson	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Oscar Brantley, Jr.	15	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Joseph J. Case	16	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
John Collier	17	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
2	24.96	1.00	4.14	21.02	.83	.83	102.24	346.56	21.67	324.89
3	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
4	-	-	-	-	-	-	57.42	192.20	14.99	177.21
5	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
6	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	321.02
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
10	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
11	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
12	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
13	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
14	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
15	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
16	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
17	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Jerry Wayne Ellis	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Dan J. Leonardo	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Richard Ragland	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Dale C. Jensen	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Dale Johnson	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Robert Krakowski	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Robert Sather	7	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
James Schmidt	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Robert A. Symes	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jerome B. Trelstad	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Edmund Allman	11	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	26.20	.50	2.07
Olga Maroni Beaver	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	12.60	.25	1.04
Donna Haver Carvey	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Suzanne Casey	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Eleanor K. Cheney	15	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Roger Creighton	16	-	-	-	-	-	-	42.00	.83	.83	55.40	1.00	4.14
Lucyann Davitt	17	25.20	.50	.50	29.40	.58	.58	-	-	-	-	-	-

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	4.16	.17	.69	-	-	-	89.21	285.77	21.67	264.10
2	24.96	1.00	4.14	25.63	1.00	1.oo	103.42	352.69	21.67	331.02
3	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
4	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
5	22.88	.92	3.80	25.63	1.00	1.00	102.64	349.41	21.67	327.74
6	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	321.02
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
10	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
11	10.40	.42	1.73	15.84	.50	.50	83.52	272.68	18.36	254.32
12	-	-	-	-	-	-	70.10	214.99	16.83	198.16
13	24.96	1.00	4.14	16.41	.67	.67	101.09	340.48	21.67	318.81
14	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
15	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
16	24.96	1.00	4.14	25.63	1.00	1.00	58.03	219.96	11.47	208.49
17	-	-	-	-	-	-	30.20	86.96	6.63	80.33

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Norman Forbush	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Cathy French	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Sandi Gagliardi	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Margarita Holmstrom	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Marilyn Jones	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Panida Keeton	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Robert Mahan	7	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Janice E. Maruszewski	8	-	-	-	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Sharon McCann	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
James O'Connor	10	-	-	-	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Joan Rizzo	11	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Dan Shoffner	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Dorothy Simac Monson	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Celeste Vivian	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Julie Weick	15	25.20	.50	.50	50.40	1.00	1.00	54.40	1.00	1.00	55.40	1.00	4.14
Ethel Workman	16	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
George Wray	17	-	-	-	-	-	-	21.00	.42	.42	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
4	24.96	1.00	4.14	14.44	.58	.58	100.58	337.87	21.67	316.20
5	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
6	12.48	.50	2.07	21.70	.83	.83	97.81	327.76	21.67	306.09
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	321.02
8	24.96	1.00	4.14	25.63	1.00	1.00	88.96	312.03	18.61	293.42
9	24.96	1.00	4.14	7.86	.33	.33	98.89	329.05	21.67	307.38
10	24.96	1.00	4.14	3.93	.17	.17	83.45	283.16	18.97	264.19
11	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
12	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
13	24.96	1.00	4.14	23.66	.92	.92	102.91	350.05	21.67	328.38
14	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
15	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
16	18.72	.75	3.11	25.63	1.00	1.00	101.11	342.86	21.67	321.19
17	24.96	1.00	4.14	25.63	1.00	1.00	48.28	188.39	8.92	179.47

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Patrick Auge	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
William L. Best	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Richard W. Clemens	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Tommy L. Deeter	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jane Anne Dolcater	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Lester Fairchild	6	21.00	.42	.42	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Rudy Garcia	7	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
David W. Hammond	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Edward J. Healy	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Richard Heitert	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Ralph Burton Hesse	11	16.80	.34	.34	50.40	1.00	1.00	50.40	1.00	1.00	-	-	-
Lloyde Hohl	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Joseph J. Kell, Jr.	13	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Milford E. Langness	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Edward R. Lemp	15	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Harvey D. Logan	16	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
E. J. Lowell	17	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
4	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
5	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
6	24.96	1.00	4.14	25.63	1.00	1.00	103.24	345.90	21.16	324.74
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
10	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
11	-	-	-	-	-	-	60.08	182.36	14.28	168.08
12	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
13	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
14	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
15	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
16	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
17	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Paul A. Murry	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Robert J. Parker	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Paul Silvestri	3	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Kenneth Simpson	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Dennis Anderseon	5	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	25.20	.50	2.07
Linda Hull Banducci	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Alice Castro	7	25.20	.50	.50	16.80	.33	.33	-	-	-	-	-	-
Sam Chacy (Chang)	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Thelma Gonzales	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Veth Allen Gaush	10	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Georgia Johnston	11	21.00	.42	.42	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Sharon Koizumi	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Patricia Lyons	13	25.20	.50	.50	16.80	.33	.33	-	-	-	-	-	-
Richard Meyers	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Francine Moblad	15	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Nita Neilson	16	25.20	.50	.50	46.20	.92	.92	-	-	-	-	-	-
Jan Noto	17	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	24.96	1.00	4.14	21.02	.83	.83	102.24	346.56	21.67	324.89
4	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
5	-	-	-	-	-	-	75.32	234.09	18.36	215.73
6	18.72	.75	3.11	25.63	1.00	1.00	101.11	342.86	21.67	321.19
7	-	-	-	-	-	-	23.49	67.15	-	67.15
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	24.96	1.00	4.14	17.43	.67	.67	101.32	341.73	21.67	320.06
10	16.64	.67	.67	25.63	1.00	1.00	99.71	336.86	21.67	315.19
11	24.96	1.00	4.14	25.63	1.00	1.00	100.99	345.90	21.51	324.39
12	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
13	-	-	-	-	-	-	23.49	67.15	5.10	62.05
14	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
15	14.56	.58	2.42	11.53	.42	.42	95.92	317.39	21.67	295.72
16	-	-	-	-	-	-	39.27	113.51	-	113.51
17	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board
Charlene O'Grady	1	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Stephanie Pappas	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	8.40	.17	.17
Dorreene Proctor	3	25.20	.50	.50	-	-	-	-	-	-	-	-	-
Darlene Rauschnot	4	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Margaretha Ringborg	5	25.20	.50	.50	16.80	.34	.34	-	-	-	-	-	-
Carol H. Stevenson	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Barbara Warren	7	8.40	.17	.17	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Susan Whiteley	8	25.20	.50	.50	50.40	1.00	1.00	37.80	.75	.75	-	-	-
Clarence Anderson	9	25.20	.50	.50	16.80	.34	.34	-	-	-	-	-	-
Bruce Johnson	10	25.20	.50	.50	16.80	.34	.34	-	-	-	-	-	-
Thomas E. Kovarik	11	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	-	-	-
John A. Kelly	12	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Robert Abel	13	25.20	.50	.50	4.20	.08	.08	-	-	-	-	-	-
Stephen R. Buckel	14	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Jerry W. Hengst	15	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
LeGande Jone	16	25.20	.50	.50	50.40	1.00	1.00	16.80	.34	.34	-	-	-
Jerry VanNortwick	17	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
2	-	-	-	-	-	-	68.17	207.91	16.32	191.59
3	-	-	-	-	-	-	8.05	34.25	3.06	31.19
4	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
5	-	-	-	-	-	-	23.49	67.17	5.10	62.07
6	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
7	24.96	1.00	4.14	25.63	1.00	1.00	93.81	325.62	19.63	305.99
8	-	-	-	-	-	-	59.03	176.93	13.77	163.16
9	-	-	-	-	-	-	23.49	67.17	-	67.17
10	-	-	-	-	-	-	23.49	67.17	5.10	62.07
11	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
12	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
13	-	-	-	-	-	-	16.70	47.26	-	47.26
14	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
15	5.20	.08	.35	-	-	-	89.39	286.56	21.67	264.89
16	-	-	-	-	-	-	49.33	145.41	11.22	134.19
17	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02

Name of Plaintiff		July 1, 1972 to December 31, 1972			1973			1974			1975		
		Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board	Grand Lodge	Sys. Local	Grand Board	Lodge	Sys. Local	Board
Dee Dee Ericksen	1	21.00	.42	.42	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Joseph Fialdini	2	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Theresa Hazen	3	25.20	.50	.50	29.40	.58	.58	-	-	-	-	-	-
Loetta H. Musio (Muoio)	4	8.40	.17	.17	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
John O'Connell	5	25.20	.50	.50	29.40	.58	.58	-	-	-	-	-	-
R. W. Roberson	6	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Kathi Stovel	7	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Raymond Avalos	8	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14
Delyce Wensel	9	25.20	.50	.50	50.40	1.00	1.00	50.40	1.00	1.00	55.40	1.00	4.14

	1976			1977			Interest to May 15, 1980	Gross Rebate	Prior Rebate	Net Rebate
	Grand Lodge	Local	Sys. Board	Grand Lodge	Local	Sys. Board				
1	24.96	1.00	4.14	25.63	1.00	1.00	100.99	345.90	21.67	324.23
2	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
3	-	-	-	-	-	-	30.20	86.96	6.63	80.33
4	24.96	1.00	4.14	25.63	1.00	1.00	93.81	325.62	-	325.62
5	-	-	-	-	-	-	30.20	86.96	6.63	80.33
6	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
7	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
8	24.96	1.00	4.14	25.63	1.00	1.00	103.42	352.69	21.67	331.02
9	24.96	1.00	4.14	-	-	-	96.87	318.51	21.67	296.84

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Attorneys for Plaintiffs

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

ALLAN L. FAILS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Defendants.

Case No. 73-113-N
Consolidated with
Case No. 73-118-N

NOTICE OF
CROSS-APPEAL

TO: Defendants, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., and their attorneys of record.

NOTICE IS HEREBY GIVEN that Plaintiffs appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 9th day of July, 1980.

DATED: August 5, 1980

MICHAEL E. MERRILL
RAYMOND J. LaJEUNESSE, JR.
HUGH L. REILLY
Attorneys for Plaintiffs

By Michael E. Merrill
Michael E. Merrill

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am a citizen of the United States and a resident of the county aforesaid. I am over the age of eighteen (18) years and not a party to the within entitled action. My business address is 4420 Hotel Circle Court, Suite 345, San Diego, California, 92108.

On August 5, 1980, I served the within NOTICE OF CROSS APPEAL on the defendants in said action, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as follows:

Joseph L. Rauh, Jr., Esq.
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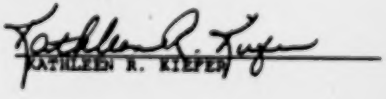
I delcare, under penalty of perjury, that the foregoing is true and correct.

Executed on August 5, 1980 at San Diego, California.



IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 80-5562
80-5603

HOWARD ELLIS, *et al.*,
Plaintiffs-Appellants,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *et al.*,
Defendants-Appellees.

ALLEN FAILS, *et al.*,
Plaintiffs-Appellants,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of California

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REPLY BRIEF FOR DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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* * * *

[25] 16. Re p. 53, p. 55, alleging that "no union witness has ever attempted to refute" plaintiffs' oft-repeated claim of Union participation in "a money-laundering scheme which illegally channeled funds into the campaigns of union-endorsed political candidates." Defendants have refuted this claim in court papers at least twice (CR 265, p. 4, n.2 and CR 313, p. 39 ¶ 94) as well as in oral argument (RT, Oct. 23, 1978, at 1326). The evidence cited by plaintiffs shows that the transactions to which plaintiffs refer work the opposite of what plaintiffs allege: BRAC gave up political money voluntarily donated to its separate segregated fund in exchange for general funds which are politically restricted and covered by BRAC's political rebate plan. This is obviously both legal and proper.

* * * *

Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1150

IN THE Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX — EXHIBITS

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PETITION FOR CERTIORARI FILED JANUARY 7, 1983.
CERTIORARI GRANTED APRIL 18, 1983.

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1977 GRAND LODGE EXPENDITURES: I OFFICERS

Officer	Function	Cost	Percent ¶22	¶ 22 Cost	Rebated	Collective barg. cost
1 International President	Collective bargaining & administrative (incidental ¶ 22 activities)	128,360.44	10%	12,836.04	3,160.27	112,364.
2 International Vice-President Coleman	Collective bargaining (incidental ¶ 22 activities)	83,391.38	10%	8,339.14	624.01	74,428.
3 International Vice-President Devlin	Organizing	79,492.83	All but rebatables	79,099.02	393.81	0.
4 International Vice-President Fitzgibbon	Collective bargaining; some organizing; incidental other ¶ 22 activities	108,815.86	30%	32,644.76	1,209.20	74,961.
5 International Vice-President Granlund	Collective bargaining & administration (incidental ¶ 22 activities)	82,097.71	10%	8,209.77	609.85	73,278.
6 International Vice-President Kilroy	Administration & collective bargaining (incidental ¶ 22 activities)	67,148.98	10%	6,714.90	1,158.98	59,275.

7 International Vice-President Kroll	NA	NA	NA	NA	NA	NA
8 International Vice-President Lynch	Collective bargaining (incidental ¶ 22 activities)	78,685.38	10%	7,868.54	1,368.41	69,448.
9 International Vice-President McGregor	Collective bargaining Canada (incidental ¶ 22 activities)	74,622.05	10%	7,462.21	0.00	67,159.
10 International Vice-President Neal	Collective bargaining (incidental ¶ 22 activities)	73,592.02	10%	7,359.20	510.66	65,722.
11 International Vice-President Otero	International affairs; political & labor; collective bargaining; incidental other ¶ 22 activities	84,739.82	All but rebatables	76,056.45	8,683.37	0.
12 International Vice-President Toppen	Collective bargaining (incidental ¶ 22 activities)	76,224.89	10%	7,622.49	771.54	67,830.
13 Ass't International Vice-President Bishop	Collective bargaining	58,417.64	10%	5,841.76	1,800.72	50,775.

14 Ass't International Vice-President Norton	Collective bargaining	58,259.25	10%	5,825.93	2,712.85	49,720.
15 Ass't International Vice-President Smith	Collective bargaining	58,916.17	10%	5,891.62	0.00	53,024.
16 Board of Trustees	Financial review & control	63,966.67	10%	6,396.67	1,815.13	55,754.
	TOTAL	1,176,731.09		278,168.50	24,818.80	873,743.

Amount chargeable as collective bargaining costs for Western Airlines membership, which constituted 1.9% of the total membership in 1977: 16,601.

1977 GRAND LODGE EXPENDITURES: II
COLLECTIVE BARGAINING AND COLLECTIVE BARGAINING SUPPORT

Category	Function	Cost	Percent ¶ 22	¶ 22 Cost	Rebated	Collective barg. cost
17 Industry Relations	Collective bargaining	514,747.48	0	0.00	1,804.22	512,943.
18 Social Insurance	Collective bargaining	50,058.30	0	0.00	0.00	50,058.
19 International Affairs	¶ 22 activities & collective bargaining support	8,223.10	All but reba-tables	7,490.77	732.33	0.
20 Research & Education	Collective bargaining support (incidental ¶ 22 activities)	91,784.33	20%	18,356.87	718.22	72,709.
21 Railroad Patrolmen	Collective bargaining	1,611.12	0	0.00	0.00	1,611.
22 REA O'Hare	Collective bargaining	73.84	0	0.00	0.00	73.
23 National Negotiating Committee	Collective bargaining	718.25	0	0.00	0.00	718.
24 Canadian Negotiating Committee	Collective bargaining	13,134.00	0	0.00	0.00	13,134.
25 Harvard trade union courses	Collective bargaining support	0.00	0.0	0.00	0.00	0.

26 Manpower Training	Collective bargaining support	81,767.60 Gov't reim. 55,990.50 net 25,777.10	0	0.00	0.00	25,777.10
27 International President's Bulletin	NA	NA	NA	NA	NA	NA
28 Professional services	Collective bargaining support	168,193.99	0	0.00	12,456.79	155,737.20
29 Membership protective	Collective bargaining	0.00	0	0.00	0.00	0.00
	TOTAL	930,312.01		25,847.64	15,711.56	832,762.31

Amount chargeable as collective bargaining costs for Western Airlines membership, which constituted 1.9% of total membership in 1977: 15,822.48

1977 GRAND LODGE EXPENDITURES: III
ADMINISTRATION, HOUSEKEEPING & OVERHEAD

Category	Function	Cost	Percent ¶ 22	¶ 22 Cost	Rebated	Collective barg. cost
30 Administration	Administrative & necessary housekeeping functions (incidental ¶ 22 activities)	360,918.17	10%	36,091.82	8,043.46	316,782.
31 Washington office	Administration-Washington	34,132.54	10%	3,413.25	0.00	30,719.
32 Philadelphia office	NA	NA	NA	NA	NA	NA
33 Montreal office	Administrative & necessary housekeeping functions	92,678.86	0	0.00	0.00	92,678.86
34 Canadian Executive Council	Administration	0.00	0	0.00	0.00	0.00
35 International Secretary-Treasurer	Administration of necessary housekeeping functions (incidental ¶ 22 activities)	123,007.58	10%	12,300.76	1,104.57	109,602.25
36 Data Processing	Necessary housekeeping functions (incidental ¶ 22 support)	205,397.28	17.5%	35,944.52	1,411.46	168,041.30

37 Comptroller	Necessary housekeeping functions (incidental ¶ 22 support)	135,051.05	*	8,165.51	3,701.07	123,184.47
38 Reproduction & Switchboard	Necessary housekeeping functions (incidental ¶ 22 support)	78,990.85	10%	7,899.09	179.24	70,912
39 O'Hare Building	Necessary housekeeping functions (incidental ¶ 22 support)	95,368.60	9.5%	18,596.88	85.77	76,685
40 Administration IST	Necessary housekeeping functions	47,144.28	10%	4,714.43	44.42	42,385
41 Audit & Bonding	Necessary housekeeping functions	107,416.25	0	0.00	0.00	107,416
42 Auditors	Necessary housekeeping functions	302,827.72	0	0.00	280.38	302,547
43 Per Capita Tax	Necessary housekeeping functions	342,161.66	0	0.00	245.35	341,916
44 Cashier	Necessary housekeeping functions	112,562.10	10%	11,256.21	0.00	101,305
45 Annuities	Overhead	48,831.44	0	0.00	0.00	48,831
46 Transfer Allowance	Overhead	4,495.35	0	0.00	0.00	4,495

47 Separation Allowance	Overhead	56,389.20	0	0.00	0.00	56,389.
48 Pension Prior Service Funding	Overhead	118,589.26	0	0.00	0.00	118,589.
49 Auto expenses	Overhead primarily for collective bargaining (incidental ¶ 22 support)	65,093.25 per use re im 7,099.98 net 57,993.27	22.5%	13,048.48	0.00	44,944.
50 Building expenses	Overhead both for collective bargaining & ¶ 22 activities	854,680.34 less rent (423,068.81) Net 431,611.53	19.5	84,164.25	0.00	347,447.
51 Depreciation	Overhead both for collective bargaining & ¶ 22 activities	82,509.10	*	17,531.88	0.00	64,977.
52 Insurance	Overhead both for collective bargaining & ¶ 22 activities	56,796.00	20%	11,359.20	0.00	45,436.
53 Office expenses	Overhead both for collective bargaining & ¶ 22 activities	603,291.02	*	84,735.33	2,558.79	515,996.

54 Membership services	Necessary housekeeping functions	9,734.61	0	0.00	3,525.00	6,209.
55 Fidelity Fund	Necessary housekeeping functions	17,453.00	0	0.00	0.00	17,453.
	TOTAL	3,955,519.51		349,221.61	21,179.51	3,154,949.

Amount chargeable as collective bargaining costs for Western Airlines membership, which constituted 1.9% of total membership in 1977: 59,944.0

1977 GRAND LODGE EXPENDITURES: IV
PRIMARILY ¶ 22 AND REBATABLE

Category	Function	Cost	Percent ¶ 22	¶ 22 Cost	Rebated	Collective barg. cost
56 General Fund other expenses	Includes various items rebatable under ¶¶ 1,4 of October 1975 rebate plan	261,265.25 Can. ser. chg. (211,606.93) net 49,658.32	0	0.00	36,100.73	13,557.59
57 Legal	Collective bargaining support but includes litigation not on WAL contract ¶ 22 (10)	670,481.64	*	401,581.12	70,010.61	198,889.91
58 State Legislative Representatives	Rebated under ¶¶ 1, 2 of October 1975 rebate plan	31,505.75 residuals RSLF 31,505.75 + net 0.00	0	0.00	0.00	0.00
59 State Legislative	Rebatable under ¶¶ 1,2 of October 1975 rebate plan	207,344.33 residuals RSLF 207,344.33 + net 0.00	0	0.00	0.00	0.00
60 Labor affiliations	Rebatable under ¶ 3 of October 1975 rebate plan	327,866.34	0	0.00	327,866.34	0.00
61 Convention	¶ 22 (8)	17,259.11	All	17,259.11	0.00	0.00

62 Death Benefit	¶ 22 (2)	1,344,537.97	All but rebatables	1,343,951.65	586.32	0.00
63 Organizing	¶ 22 (3,4)	629,872.27	All but rebatables	624,224.47	5,647.80	0.00
64 Official Publication	¶ 22 (5)	376,712.35	All but rebatables	365,575.91	11,136.44	0.00
65 Disaster Relief	¶ 22 (6)	26,450.00	All	26,450.00	0.00	0.00
66 Legislative	Rebatable under ¶ 2 of October 1975 rebate plan	240,308.68	0	0.00	240,308.68	0.00
	TOTAL	4,133,603.69		2,779,042.26	691,656.92	212,447.50

Amount chargeable as collective bargaining costs for Western Airlines membership, which constituted 1.9% of total membership in 1977: 4,036

1977 GRAND LODGE EXPENDITURES: V
TOTAL EXPENDITURES

¶ 22 Costs		$3,432,280.01	37.1%
Rebated		753,366.79	8.1%
Collective Bargaining Costs		5,073,903.20	54.8%
TOTAL EXPENDITURES			9,259,550.00
Reimbursement and Interfund Transfer Items		936,616.30	
Total Disbursements		10,196,166.30	
Amount Chargeable as Collective Bargaining Costs for Western Airlines Membership, Which Constituted 1.8% of Total Membership in 1977			96,404.16

REPAYMENTS DUE PLAINTIFFS UNDER PARAGRAPH 22 FOR GRAND LODGE NON-COLLECTIVE BARGAINING EXPENDITURES IN 1977

Method 1 -- Aggregation of Grand Lodge Paragraph 22 Expenditures, Prorated to Each Dues Payer

a.	Total Grand Lodge Expenditures	$9,259,550.00
b.	Total Grand Lodge Expenditures for ¶ 22 Activity	3,432,280.01
c.	Percent of Total Expenditures Representing ¶ 22 Expenditures, Refundable Under ¶ 22 (b. divided by a.)	37.1%
d.	Total Dues Paid by Each Plaintiff to Grand Lodge in 1977	67.80
e.	Repayment Due to Each Plaintiff Under ¶ 22 for 1977 Grand Lodge ¶ 22 Expenditures (percent c. applied to d.)	25.15

Method 2 -- Aggregation of Grand Lodge Collective Bargaining Expenditures, Prorated to Each Dues Payer

a.	Total Grand Lodge Expenditures	$9,259,550.00
b.	Total Grand Lodge Expenditures for Collective Bargaining Activity	5,073,903.20
c.	Percent of Total Expenditures Representing Collective Bargaining Activity (b. divided by a.)	54.8%
d.	Total Dues Paid by Each Plaintiff to Grand Lodge in 1977	67.80
e.	Portion of Total Dues Paid Which is Non-Returnable (percent c. applied to d.)	37.15
f.	Portion Already Returned Under Rebate Plan (7.8%)	5.29
g.	Remaining Portion Due for Repayment to Each Plaintiff for 1977 Grand Lodge Non-Collective Bargaining Expenditures (e. and f. subtracted from d.)	25.36

Method 3 -- Aggregation of Grand Lodge Western Airlines Collective Bargaining Expenditures, Prorated to Each Dues Payer -- With Correction for Dues Differential

a.	Total 1977 Grand Lodge Collective Bargaining Expenditures for Western Airlines Members	96,404.16
b.	Number of 1977 Western Airlines Members	3,886
c.	Total 1977 Grand Lodge Collective Bargaining Expenditures for Each Western Airlines Member (b. divided by c.)	24.81
d.	Collective Bargaining Expenditures for Each Western Airlines Member Adjusted to Account for Dues Differential (c. times 1.261)*	31.29
e.	Total Dues Paid by Each Plaintiff to Grand Lodge in 1977	67.80

f.	Dues Paid by Each Plaintiff for Non-Collective Bargaining Expenditures (e. minus d.)	36.51
g.	Portion Already Returned Under Rebate Plan (7.8%)	5.29
h.	Remaining Portion Due for Repayment to Each Plaintiff for 1976 Grand Lodge Non-Collective Bargaining Expenditures (f. minus g.)	31.22

* Provisional Adjustment Factor: Western Airline members' annual dues to Grand Lodge in proportion to reduced-rate annual dues of others to Grand Lodge 67.80 ÷ 53.78 = 1.261. Defendants may be able to provide from Grand Lodge data a more refined adjustment ratio reflecting all Grand Lodge dues payment variations.

Method 4 -- Aggregation of Grand Lodge Western Airlines Collective Bargaining Expenditures, Prorated to Each Dues Payer -- Without Correction for Dues Differential

a.	Total 1977 Grand Lodge Collective Bargaining Expenditures for Western Airlines Members	$96,404.16
b.	Number of 1977 Western Airlines Members	3,886
c.	Total 1977 Grand Lodge Collective Bargaining Expenditures for Each Western Airlines Member (a. divided by b.)	24.81
d.	Total Dues Paid by Each Plaintiff to Grand Lodge in 1977	67.80
e.	Dues Paid by Each Plaintiff for Non-Collective Bargaining Expenditures (d. minus c.)	42.99
f.	Portion Already Returned Under Rebate Plan (7.8%)	5.29
g.	Remaining Portion Due for Repayment to Each Plaintiff for 1977 Grand Lodge Non-Collective Bargaining Expenditures (e. minus f.)	37.70

DEPRECIATION: ITEM 51 1977

Subcategory	Total Cost	¶ 22 Allocation	¶ 22 Cost
Washington office	$ 3,298.88	66.7%	$ 2,200.35
O'Hare	77,131.52	19.5%	15,040.65
Montreal	1,142.36	10%	114.24
Philadelphia	728.40	10%	72.84
Omaha	57.18	10%	5.72
Laurel	58.53	10%	5.85
New Jersey	92.23	100%	92.23
	$82,509.10		$17,531.88

OFFICE EXPENSES: ITEM 53 1977

Subcategory	Total Cost	¶ 22 Allocation	¶ 22 Cost
Rent office equipment			
Rosemont--IBM	$ 48,036.99	17.5%	$ 8,406.47
Rosemont--other	58,428.44	10%	4,842.84
Washington	1,661.64	50%	830.82
Montreal	2,463.04	10%	246.30
Repair office equipment			
Rosemont	5,488.08	10%	548.81
Washington	187.43	50%	93.72
Postage			
Rosemont	45,033.15	10%	4,503.32
Washington	1,000.00	50%	500.00
Montreal	5,893.59	10%	589.36
Telephone			
Rosemont	88,496.27	10%	8,849.63
Washington	5,371.13	50%	2,685.57
Montreal	7,719.83	10%	771.98
Express			
Rosemont	5,461.62	10%	546.16
Washington	18.57	50%	9.28
Printing & office supplies			
Rosemont--IBM	14,346.11	17.5%	2,510.56
Rosemont--other	83,793.53	10%	8,379.85

Washington	$ 1,284.27	50%	642.14
Montreal	5,658.06	10%	565.81
Dues & subscriptions			
Rosemont	2,507.83	10%	250.78
Industrial Relations	2,762.76	0	0.00
Research & Education	4,745.61	20%	949.12
Washington	88.00	50%	44.00
Montreal	2,206.95	10%	220.69
Promotional aids			
Rosemont	10,590.08	10%	1,059.00
Montreal	1,678.41	10%	167.94
Meetings	35,435.74	10%	3,543.57
Rent			
Rosemont	80,657.94	19.5%	15,728.30
Washington	18,846.60	50%	9,423.30
Montreal	28,887.48	10%	2,888.75
Miscellaneous office expenses			
Rosemont	2,896.10	10%	289.61
Washington	538.38	50%	269.19
Montreal	9,174.22	10%	917.42
Third Division	613.98	0	0.00
Cupertino	2,195.40	10%	219.54
Philadelphia	51.71	10%	5.17
REA	4,339.51	0	0.00
Omaha	1,271.69	10%	127.17
Laurel	786.34	10%	78.63
Roanoke	619.65	10%	61.97

Florence	NA	NA	NA
Manpower	$ 800.00	0	0.00
Interest expense IBM	11,248.89	17.5%	1,968.56
	$603,291.02		$84,735.33

OTHER EXPENSES: ITEM 56 1977

Subcategory	Total Cost	¶ 22 Cost	Rebated	Collective bargaining
Donations	$ 23,796.39	$ 0.00	$23,796.39	$ 0.00
Refund dues	3,594.16	0.00	0.00	3,594.16
Disaster relief	7,303.45	(see Item 65)	0.00	7,303.45
Banquets, luncheons	9,015.08	0.00	9,015.08	0.00
Speakers honorariums	NA	NA	NA	NA
Miscellaneous	2,659.98	0.00	0.00	2,659.98
Foreign travel	3,289.26	0.00	3,289.26	0.00
Interfund service charge (Canada)	211,606.93	NA	NA	NA
	$261,265.25	0.00	36,100.73	13,557.59

LEGAL: ITEM 57 1977

Subcategory	Total Cost	¶ 22 Cost	Rebated	Collective Bargaining
Salaries	$144,300.09]			
Fringe benefits	40,344.17]	$ 74,345.24	$ 478.50	$134,835.71
Travel expenses	25,015.19]			
Office expenses	7,991.88	0.00	0.00	7,991.88
Professional fees	393,309.34	313,435.88	55,732.11	24,141.35
Consultants	4,653.84	0.00	0.00	4,653.84
Miscellaneous legal expenses	974.34	0.00	0.00	974.34
Labor affiliations	22,440.00]	13,800.00	13,800.00	5,160.00-
Arbitration expenses	18,072.79	0.00	0.00	18,072.79
Strike benefits	13,380.00	0.00	0.00	13,380.00
Third Division awards	NA	NA	NA	NA
	$670,481.64	$401,581.12	$70,010.61	$198,889.91

DEFENDANTS' TRIAL EXHIBIT CA

MEMORANDUM

To: BRAC Executive Council — October 5, 1975

From: Joseph L. Rauh, Jr.
John Silard
Harriett R. Taylor

Subject: Recommendations Concerning Dues Rebates For Expenditures for Political Causes

By letter dated September 10, 1975, President Dennis and General Counsel Hirsh requested us to become Chief Counsel for BRAC in the *Ellis* and *Fails* cases, and to review BRAC's actions in the area of dues rebates and make recommendations thereon. We received that request on September 15 and accepted the assignment the following day by oral communication to General Counsel Hirsh. We have worked diligently since that time to prepare these recommendations for the Council at its San Francisco meeting in early October.

The guiding criteria for the grant of dues rebates to union dissenters are found in the Supreme Court's *Street* decision (367 U.S. 740). There the Court heard and rejected frontal assaults on compulsory union dues based on claims that unions spend money for political causes which some members oppose; the Court categorically rejected the idea that an employe could get out of the payment of dues because some of the dues went for political causes he opposed. But the Court also held that, to "attain the appropriate reconciliation between majority and dissenting interests in the area of political expression" (367 U.S. at 773), under the Railway Labor Act unions may not use an objecting employe's dues "to support political causes which he opposes" (367 U.S. 769).[1] The Court in *Street* (367 U.S. at 775) and again in *Allen* (373 U.S. 113) approved the remedy of restitution to the dissenting employe of that portion of dues expended for political causes. In *Allen* the Court went further, urging unions to adopt their own rebate systems which would avoid the necessity of costly and troublesome litigation, by providing the employe with an intra-union rebate remedy to vindicate his rights.

An increasing number of national unions, including BRAC, have adopted such rebate plans; we believe it is good sense for unions to

[1]The "political causes" terminology was deliberate and significant, for it appears over and over again in the *Street* opinion. See 367 U.S. at 750, 767, 768, 769, 770, 771, 774, 775.

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follow that course with a generous rebate system, both for the protection of the unquestionable rights of their political-expenditure dissenters and in their own best interests to avoid unnecessary litigation. In establishing such union rebate systems, three principal problems immediately arise: 1) defining the kinds of union activities which fall within the "political causes" area, 2) making sure that, once so defined, the union's accounting system for the establishment of a dues-rebate rate includes every level and kind of union expenditure and disbursement, and 3) insuring fair internal union procedure and remedy for the employe who believes the rebate offered him is inadequate.

(1) As concerns the definition of "political causes" the Supreme Court's decision leaves considerable ambiguity. For instance, while it seems clear from *Street* that partisan election activities are included (see 367 U.S. at 773), it is not certain that would also include political messages and activities directed at the union's own membership, especially in the light of Congress' recent validation of such activities under 18 U.S.C. 610. See also *United States v. CIO*, 335 U.S. 106. Moreover, when it comes to legislative lobbying costs rather than elections activities, there is also considerable doubt whether such expenditures are within "political causes." When undertaken in direct aid of the basic organizational mission which originally "gave rise to the need for group action," even Justice Douglas (concurring at p. 777) suggests that rebates may not be required. The Supreme Court's plurality decision in *Lathrop v. Donahue*, 367 U.S. 820, 846-47, announced concurrently with *Street*, suggests that in the absence of a particular objection by a dissenter to a particular legislative expenditure the Constitution requires no rebates and that at least some lobbying expenditures "may be properly apportioned" to compulsory dues.

Nevertheless, we deem it best to provide the broadest possible respect for personal choices in the area of politics and ideology, and to avoid unnecessary bookkeeping burdens which narrower differentiation would require. Accordingly, we recommend that the union rebate system encompass all expenditures in the area of elections, legislative lobbying, and dues or contributions to other organizations, including labor, charitable, and educational groups. While such a standard goes farther than the law appears to require, in operation it avoids undue accounting burdens which would arise under a narrower standard and also reduces the likelihood of unnecessary and burdensome litigation.

(2) A second important question concerns the union accounting system to be used. It is indispensable that such a system include all payments,

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whether made at the national, regional, or local level and whether by way of direct union contributions, expenditures, facilities, or compensated employe time. Initially such an audit task may seem onerous. But it is clear that to measure fairly the portion of the union's dues income expended for political causes there must be an audit system which includes every form of union disbursement.

(3) A third important question concerns the internal union procedures and remedies for the protection of the rights of dissenters. Here we point out that there is no substitute for a Public Review Board to which any dissenter can go if he believes that the amount of the rebate he is being offered does not fully represent the expenditures which the Supreme Court has indicated are rebatable. The UAW's successes in the *Reid* and *McNamara* cases against political objector complaints can be attributed in substantial part to its Public Review Board. A generous rebate system and careful accounting, together with an independent review system, will in the long run avoid harassing litigation.

Having in mind, then, the desirability of a broad definition of political expenditures, a comprehensive reporting and auditing system to determine what proportion of dues are so expended, and the advantages of an impartial internal remedy, we recommend the following:

1. As items to be included in BRAC's rebate plan:
   (i) All funds expended, directly or indirectly, on the election of candidates for public office, including contributions to any political party or political organization; staff time spent during working hours on behalf of any political party, political organization, or candidate for public office; expenditures on behalf of and facilities used for any political party, political organization or candidate for public office; and a prorated proportion of the cost of the Railway Clerk interchange and other union publications to cover space devoted to the above.
   (ii) All funds expended, directly or indirectly, on legislative lobbying, including time and expenses of full or part-time union staff, expenses of unsalaried persons reimbursed by the union, and the full 30¢ allocated to the State Legislative Committees.
   (iii) All dues to the AFL-CIO, CLC, and affiliated organizations of either.
   (iv) All contributions to other organizations, including charitable and educational groups.
   (v) All of the above should include Grand Lodge, System Board, Local Lodge, and State Legislative Committee expenditures.

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We have discussed the above with staff members of the Brotherhood, and while precise calculation is not yet possible it appears that these proposals would represent a rebate in the general vicinity of 5% of the dues paid by employes.

2. With the aid of your accountants, we recommend that you set up a reporting and accounting system which will accurately measure the amount of political expenditures (as defined in 1, above) year by year for purposes of rebate. The accounting for 1975 should permit rebates to be made early in 1976 for dissenters' 1975 dues payments.

3. Establish a Public Review Board to hear dissenters' claims for a higher rebate figure.

4. While the above proposals should yield a fair and workable political rebate system, meeting generously all the requirements laid down by the Supreme Court in *Street* and in *Allen*, there remains the question of calendar years before 1975, when employes who had objected in 1972 to political expenditures were not afforded rebates based upon an adequately comprehensive auditing system. Some of those employes are asking in the pending *Ellis* and *Fails* cases that their entire dues payments for prior years be refunded to them due to inadequate accounting. We believe that since it could not possibly be claimed that all of the dues were spent on political causes such a course is unnecessary and goes too far. Nevertheless, these employes, we believe, should be given the benefit of any doubt. Accordingly, when the 1975 rebate proportion is established based upon the audit data for this year, all those who objected in 1972 should be given rebates in a proportion not smaller for 1972, 1973 and 1974. Moreover, if the audit system shows a higher rebate due for calendar year 1976, because it is an election year when more union expenditures in the political area may be made, we would urge that the employes who earlier objected be given the further benefit of any possible doubt by providing them with the higher rebate percentage for the years 1972 through 1974.

RAILWAY CLERK

DEFENDANTS' TRIAL EXHIBIT CB

Communication

From BRAC's International President
To all Local Lodges, System Boards
and other Subordinate Units

Pursuant to its Constitution, the Grand Lodge and its various subordinate units have over a great many years undertaken direct and effective legislative lobbying and political activity for the protection of employes of railway and airline industries. Such action is vital because the working rights of every member are directly affected when Congress or the state legislatures or other federal or state bodies take action affecting wages, hours, unemployment compensation, pensions, railroad and airline routes, and other matters of direct interest to every employe. Without an effective political voice, workers represented by BRAC would not gain the benefits they have achieved and will achieve through the legislative process, and might often lose at the polls and in the legislature the benefits won for them by the Brotherhood at the bargaining table.

Nevertheless, there are a handful of employes represented by the Brotherhood—constituting less than one-tenth of one percent of the membership—who have protested the expenditure of their dues for legislative lobbying and political activity. While we believe these employes to be misguided in their view, nevertheless the Supreme Court of the United States has made it clear that no employe has to pay dues for union political action to which he objects. To meet the rights of these few dissenters, the Brotherhood established in 1974 a system to permit the rebate of the portion of dues representing political expenditures to those few employes who persist in their objections. To assure that this political rebate system met all legal requirements, I requested and received a detailed legal analysis and recommendation from Joseph L. Rauh, Jr., John Silard and Harriett Taylor, expert constitutional lawyers with wide experience in the union political expenditure field. On October 6, 1975 the Executive Council resolved to approve and implement the report and recommendations made by Rauh, Silard and Taylor. There follows the full text of their report and recommendations which were approved by the Executive Council on October 6 to assure a fair system of dues rebates within the Brotherhood. The Board of Trustees will determine a figure in January 1976 as the appropriate rebate for those who had protested for the year 1975 and the 1975 rebates will be paid immediately thereafter.

Questions have been raised concerning the right of employes represented by BRAC under union shop or union security contracts, to refrain from becoming members of the Brotherhood without prejudice to their job rights as long as they meet the same financial obligations that apply to members. Questions have also been raised as to the eligibility of such employes, who maintain their financial obligations without becoming members, to participate in various Brotherhood economic benefit programs such as death benefits, strike benefits, and disaster relief. To clarify these issues, the Constitution and Rules of the Brotherhood, consistent with governing federal law as interpreted by the courts, are hereby construed as follows:

1. Notwithstanding the fact that the Railway Labor Act and the National Labor Relations Act permit agreements requiring compulsory union "membership" by all employes represented by the union, the courts have ruled that no employe can be required actually to enroll as a union member as a condition for retaining his job rights, as long as he meets the financial obligation to pay initiation fees, dues, and assessments which apply to members of the union, and the Grand Lodge has consistently recognized this position. To avoid any misunderstanding, every local should by appropriate means advise employes that to meet Union "membership" obligations under the contract with the employer it is sufficient that the employe meet the same financial obligations which apply to regular Union members.
2. Agency fee payers—i.e., those who maintain their financial obligations without having to become regular members of BRAC—are equally eligible for all economic benefit programs available to regular members, including strike benefits, disaster relief, death benefits and the *Railway Clerk/interchange*. Agency fee payers are "members" entitled to equal benefits within the meaning of Article 2, Section 13 of the Protective Laws governing strike benefits; Article 31 of the BRAC Constitution governing death benefits; 1975 Convention Resolution No. 376 governing disaster relief; and of Article 20 of the BRAC Constitution providing the *Railway Clerk/interchange* without cost to the member.

The information contained in these instructions should be widely disseminated and made known to the membership.

RAILWAY CLERK

DEFENDANTS' TRIAL EXHIBIT CE

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
AFL-CIO—CLC

C. L. DENNIS, International President

File: 538-1-1

Subject: Ellis & Fails vs. BRAC - Rebatable Expenditures

Circular No. 14-76

February 17, 1976

ALL GRAND LODGE OFFICERS,
STAFF AND EMPLOYES

The rebate policy for political, legislative and charitable expenses adopted by the Executive Council at San Francisco, California on October 6, 1975, required that we develop new accounting procedures to assure that every rebatable expense is properly reported and accounted for.

In Joe Rauh's memo of October 5th he defined the three principal problems of establishing a generous rebate system: (1) defining the kinds of union activities which fall within the "political causes" area, (2) making sure that, once so defined, the union's accounting system for the establishment of a dues-rebate rate includes every level and kind of union expenditure and disbursement, and (3) insuring fair internal union procedure and remedy for the employe who believes the rebate offered him is inadequate.

The new accounting system is designed to enable us to meet effectively these problems and to put into effect the policy in such a manner that we meet our responsibilities, both as to the spirit and letter of that policy. Officers and employes at all levels of the Brotherhood must assume an obligation to keep a strict account of all expenditures and cost of facilities that are attributable to rebatable activities. The attached instructions define the expenditures.

With respect to the year 1975, the policy places an obligation upon us that requires that we review all of your expenditures in order to determine those which are rebatable under the above definition of the policy. We realize that this is a most onerous duty and responsibility, but we

must ask you to search your records and memories in order to reconstruct and report to us the time and expenses that you devoted to rebatable causes in the year 1975. We have requested Comptroller Howard to prepare a list of your expenses for the year 1975 and a Xerox copy of your expense reports. This will insure that each expense period will be analyzed by you. If additional information relative to an expense account is required, please secure it from Brother Howard.

We have designed and forwarded to all System Boards and Lodges forms to be used in supplying the Grand Lodge with information relative to rebatable salaries and expenses. We are enclosing a copy of the instructions forwarded with these forms so that you will be aware of how these matters are being handled on the System Board and Local Lodge levels. It would appear that for the year 1975, the form designed for reporting rebatable salaries and rebatable traveling expenses could be used by us for making your report of these items for the year 1975. In the event that during the year 1975 you had no rebatable salaries or rebatable traveling expenses, it would only be necessary that you write "None" on the form, sign it and return to D. A. Bobo, International Secretary-Treasurer, Attention R. M. Mayberry. Form RP-1 covers Rebatable Salary and RP-2 coveres Rebatable Expenses.

Effective with January 1, 1976, we are putting into effect an administrative control which we expect each of you to observe. Specifically, no officer or employe is permitted to engage in any political activity during working hours or expend any funds unless he is specifically authorized and assigned to such activity. All assignment and authority to incur such expense is vested in the International President, or his designated representative. When such activity is authorized, the International Secretary-Treasurer will be requested to assign a specific accounting code for this activity. You will be instructed to show this on your expense report and the report of such activities in order that there will be a complete accounting of both time spent and expenses authorized.

We have designed new expense account forms and you must follow carefully the instructions contained thereon. (A supply will be provided you within ten (10) days.) These forms provide space wherein you can make daily report for any rebatable time and/or rebatable expenses. Therefore, for the year 1976 your monthly expense accounts will provide us with all the information needed to record any of your rebatable activities. All of these changes are being made in order that we can

effectively account for any and all rebatable expenditures as required under the policy statement.

In respect to any rebatable activities which have occurred in 1976, you should use Forms RP-1 and RP-2 to bring you up-to-date for the year. With the receipt of the above mentioned forms it will, of course, not be necessary that the RP-1 and RP-2 forms be used. Should you need copies of any expense reports filed during 1976, please make inquiry of Comptroller Howard and they will be forwarded.

We adopted a plan that provides a generous standard and which goes farther than the law appears to require, but it was done with the idea that it will avoid undue accounting burdens which arose under the previous policy. It will also reduce the likelihood of unnecessary and burdensome litigation. If each of us keeps these reasons clearly in mind, it will lighten the burden of the task and also help us adequately to defend our position in the event an appeal is made to the Public Review Board.

Sincerely and fraternally,

G. L. Dennis
International President

D. A. Dobbs
International Secretary-Treasurer

INSTRUCTIONS REGARDING DUES REBATE POLICY

The Executive Council at San Francisco, California on October 6, 1975 adopted the "Recommendations Concerning Dues Rebates for Expenditures for Political Causes" outlined in Attorney Rauh's memo of October 5, 1975. The effective implementation now becomes the responsibility of each and every officer and employe of the Grand Lodge and of all subordinate units.

This rebate policy was adopted in recognition of our responsibility as a union to meet the obligation established by the Supreme Court's *Street* decision to "attain the appropriate reconciliation between majority and dissenting interests in the area of political expression." Under the Railway Labor Act unions may not use an objecting employe's dues "to support political causes which he opposes."

This plan provides for a generous rebate system, both to protect the unquestionable rights of political expenditure dissenters and to avoid unnecessary litigation. In establishing such a rebate system, three principal problems immediately arise: 1) defining the kinds of union activities which fall within the "political causes" area, 2) making sure that; once so defined, the union's accounting system for the establishment of a dues rebate rate includes every level and kind of expenditure, and 3) insuring fair internal union procedure and remedy for the employe who believes the rebate offered him is inadequate.

We believe lobbying for legislative improvements in the RRA, RUIA and Con-Rail Legislation, etc., and cooperative legislative activities beneficial to the industries which employ our members are normal and legitimate extensions of the collective bargaining process.

Nevertheless, we deem it best to provide the broadest possible respect for personal choices in the area of politics and ideology, and to avoid unnecessary bookkeeping burdens which narrower differentiation would require. Accordingly, the rebate system shall encompass all expenditures in the area of elections, legislative lobbying, and dues or contributions to other organizations, including labor, charitable, and educational groups. While such a standard goes farther than the law appears to require, in operation it avoids undue accounting burdens which would arise under a narrower standard and also reduces the likelihood of unnecessary and burdensome litigation.

With the assistance of Haskins & Sells we have adopted an accounting and auditing system which must identify all rebatable expenditures made by the Grand Lodge and all subordinate units, as defined below.

Specifically, items to be included in our rebate plan are as follows:

(i) **Contributions to candidates, political parties or organizations:** (State or local candidates only; federal law prohibits any contributions from dues to candidates for federal office)

(a) Direct payments. (Form RP-3)

(b) Time spent by full-time officers and employes *during normal working hours* (8 to 5, Monday thru Friday). (Form RP-1)

(c) Part-time officers and employes need report only salaries paid them for rebatable activities. Monthly salaries of part-time officers should not be included as this salary is to compensate officers for regular duties performed. (Form RP-1)

(d) Reimbursed rebatable expenses, such as travel, meals, gifts, etc. (Form RP-2)

(e) Value of office supplies and facilities used. (Form RP-3)

(f) Prorated proportion of page cost devoted to political causes in *Railway Clerk/interchange* and any other union publication. (Form RP-3)

(ii) **All funds expended on legislative lobbying:**

(a) Direct Payments. (Form RP-3)

(b) Time spent by full-time officers and employes *during normal working hours* (8 to 5, Monday thru Friday). (Form RP-1)

(c) Part-time officers and employes need report only salaries paid them for rebatable activities. Monthly salaries of part-time officers should not be included as this salary is to compensate officers for regular duties performed. (Form RP-1)

(d) Reimbursed rebatable expenses, such as travel, meals, gifts, etc. (Form RP-2)

(e) Value of office supplies and facilities used. (Form RP-3)

(f) Per capita tax allocation to State Legislative Committees. (Form RP-3)

(iii) **All dues to the AFL-CIO, CLC and similar organizations.** (Include City and State Federation) (Form RP-3)

(iv) **Contributions to other organizations:**

(a) All charitable organizations - Examples: Red Cross, United Fund, City of Hope, etc. (Form RP-3)

(b) All education and not-for-profit organizations - Examples: E. Philip Randolph Institute, Coalition of Labor Union Women, National Association for the Advancement of Colored People, Fraternal Order of Police, etc. (Form RP-3)

(c) Time spent and expenses incurred, as in sub-paragraphs (i) and (ii) above.

The above defines the types of expenses and salaries to be classified under the rebate policy. If you have a question regarding a specific expenditure you should contact Brother Mayberry, Grand Lodge Coordinating Director, or Sol Hirsh, General Counsel.

The records of Grand Lodge and all subordinate units will be subject to examination by our Auditing and Bonding Department, as well as by an independent certified or chartered public accountant. These record and audit reports are subject to review by the Grand Lodge Board of Trustees and, in the event of appeal, by the Public Review Board.

DEFENDANTS' TRIAL EXHIBIT CF

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
AFL-CIO—CLC **C. L. DENNIS International President**

File: 538-1-1

Subject: Ellis & Fails vs. BRAC
Rebatable Expenditures

Circular No. 5-76

January 19, 1976

TO ALL SUBORDINATE UNIT OFFICERS
OF SYSTEM BOARDS AND LOCAL LODGES

Dear Sirs and Brothers:

This letter revises my letter of August 28, 1975, (file 538-1-43) relative to the reporting of rebatable political expenditures. I reported to you the new rebate policy for political, legislative and charitable expenditures adopted by the Executive Council on October 6, 1975, in my letter of November 7, 1975, file 538-1. At the Grand Lodge we have adopted new accounting procedures for our own rebatable expenditures.

The October 6, 1975 Rebate Policy has enlarged the categories of refundable expenditures from the policy of January 24, 1974, so it will be necessary to recalculate the refundable expenditures for 1975 using the new standards. The following procedures have been adopted to assure us that every rebatable expense of all subordinate units is reported to the Grand Lodge Board of Trustees in accordance with Article 28 of the Grand Lodge Constitution. Please read carefully the attached "Instructions Regarding Dues Rebate Policy." You will note the instructions designate the report form upon which to record each rebatable cost.

We have adopted three forms to be filed annually with instructions for the reporting of all expenditures starting with January 1, *1975* (note entire year of 1975):

(1) RP-1, Individual Rebatable Salary Report.

(2) RP-2, Individual Rebatable Expenditure Report.
(Forms RP-1 and 2 for Salary and Expenses are to be completed by individual officers and employes of the System Board, Division or Local Lodge.)

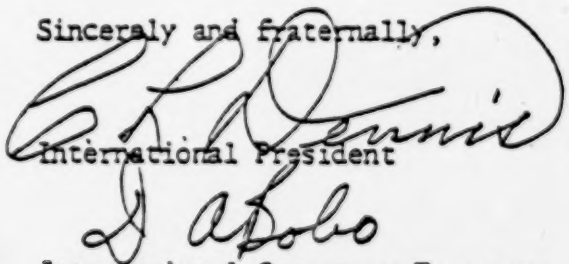
(3) RP-3, Unit Rebatable Expenditures Report.
(This form is to be completed by the financial officer of the System Board, Division or Local Lodge for all rebatable expenditures other than those listed on Forms RP-1 and 2.)

The responsibility for the distribution of Forms RP-1 and 2 to each officer and employe rests with the financial officer of each unit and should be returned to him upon completion. He will then complete Form RP-3 and present to the Board of Trustees all of the completed reports for their examination. The Board of Trustees must audit these records and forward to the International Secretary-Treasurer, attention Richard F. Bohman, General Auditor, on or before February 15, 1976.

These reports will be subject to possible examination by our Field Auditor or by a certified or chartered public accountant.

I recognize that this imposes a great burden on all officers, but these tasks must be accomplished in order to fulfill the commitment to our members under the rebate policy. It is anticipated that once we all become familiar with what is expected of us, the task will become much easier in the coming years.

Sincerely and fraternally,



International President

International Secretary-Treasurer

cc: Grand Lodge Officers
Grand Lodge Auditors

INSTRUCTIONS REGARDING DUES REBATE POLICY

The Executive Council at San Francisco, California on October 6, 1975 adopted the "Recommendations Concerning Dues Rebates for Expenditures for Political Causes" outlined in Attorney Rauh's memo of October 5, 1975. The effective implementation now becomes the responsibility of each and every officer and employe of the Grand Lodge and of all subordinate units.

This rebate policy was adopted in recognition of our responsibility as a union to meet the obligation established by the Supreme Court's *Street* decision to "attain the appropriate reconciliation between majority and dissenting interests in the area of political expression." Under the Railway Labor Act unions may not use an objecting employe's dues "to support political causes which he opposes."

This plan provides for a generous rebate system, both to protect the unquestionable rights of political expenditure dissenters and to avoid unnecessary litigation. In establishing such a rebate system, three principal problems immediately arise: 1) defining the kinds of union activities which fall within the "political causes" area, 2) making sure that; once so defined, the union's accounting system for the establishment of a dues rebate rate includes every level and kind of expenditure, and 3) insuring fair internal union procedure and remedy for the employe who believes the rebate offered him is inadequate.

We believe lobbying for legislative improvements in the RRA, RUIA and Con-Rail Legislation, etc., and cooperative legislative activities beneficial to the industries which employ our members are normal and legitimate extensions of the collective bargaining process.

Nevertheless, we deem it best to provide the broadest possible respect for personal choices in the area of politics and ideology, and to avoid unnecessary bookkeeping burdens which narrower differentiation would require. Accordingly, the rebate system shall encompass all expenditures in the area of elections, legislative lobbying, and dues or contributions to other organizations, including labor, charitable, and educational groups. While such a standard goes farther than the law appears to require, in operation it avoids undue accounting burdens which would arise under a narrower standard and also reduces the likelihood of unnecessary and burdensome litigation.

With the assistance of Haskins & Sells we have adopted an accounting and auditing system which must identify all rebatable expenditures made by the Grand Lodge and all subordinate units, as defined below.

Specifically, items to be included in our rebate plan are as follows:

(i) **Contributions to candidates, political parties or organizations:** (State or local candidates only; federal law prohibits any contributions from dues to candidates for federal office)

(a) Direct payments. (Form RP-3)

(b) Time spent by full-time officers and employes *during normal working hours* (8 to 5, Monday thru Friday). (Form RP-1)

(c) Part-time officers and employes need report only salaries paid them for rebatable activities. Monthly salaries of part-time officers should not be included as this salary is to compensate officers for regular duties performed. (Form RP-1)

(d) Reimbursed rebatable expenses, such as travel, meals, gifts, etc. (Form RP-2)

(e) Value of office supplies and facilities used. (Form RP-3)

(f) Prorated proportion of page cost devoted to political causes in *Railway Clerk/interchange* and any other union publication. (Form RP-3)

(ii) **All funds expended on legislative lobbying:**

(a) Direct Payments. (Form RP-3)

(b) Time spent by full-time officers and employes *during normal working hours* (8 to 5, Monday thru Friday). (Form RP-1)

(c) Part-time officers and employes need report only salaries paid them for rebatable activities. Monthly salaries of part-time officers should not be included as this salary is to compensate officers for regular duties performed. (Form RP-1)

(d) Reimbursed rebatable expenses, such as travel, meals, gifts, etc. (Form RP-2)

(e) Value of office supplies and facilities used. (Form RP-3)

(f) Per capita tax allocation to State Legislative Committees. (Form RP-3)

(iii) **All dues to the AFL-CIO, CLC and similar organizations.** (Include City and State Federation) (Form RP-3)

(iv) **Contributions to other organizations:**

(a) All charitable organizations - Examples: Red Cross, United Fund, City of Hope, etc. (Form RP-3)

(b) All education and not-for-profit organizations - Examples: E. Philip Randolph Institute, Coalition of Labor Union Women, National Association for the Advancement of Colored People, Fraternal Order of Police, etc. (Form RP-3)

(c) Time spent and expenses incurred, as in sub-paragraphs (i) and (ii) above.

The above defines the types of expenses and salaries to be classified under the rebate policy. If you have a question regarding a specific expenditure you should contact Brother Mayberry, Grand Lodge Coordinating Director, or Sol Hirsh, General Counsel.

The records of Grand Lodge and all subordinate units will be subject to examination by our Auditing and Bonding Department, as well as by an independent certified or chartered public accountant. These record and audit reports are subject to review by the Grand Lodge Board of Trustees and, in the event of appeal, by the Public Review Board.

(Letterhead omitted in printing.)

DEFENDANTS' TRIAL EXHIBIT CH

Board of Trustees Report for 1975 . . .

I. Introduction

At its Quadrennial Convention in May 1975, the Grand Lodge amended its Constitution by adopting a new Article 28 providing for a reduction in the dues and agency fees of those who object to the use of a portion of their money for political purposes. The Board of Trustees is charged with the responsibility of reviewing the records of all units of the Brotherhood to determine the receipts of dues and agency fees during the past year, the percentage thereof expended on political purposes, and to calculate therefrom the amount of refund each objecting member and agency fee payer is entitled to receive.

Article 28 essentially incorporates the policy statement of BRAC issued by the International President and approved by the Executive Council on January 24, 1974. On October 6, 1975, the Executive Council adopted certain recommendations further implementing and clarifying the Dues Rebate Program for our dissenting members and agency fee payers. These recommendations were announced in a communication from the International President which was published in the November issue of the *Railway Clerk/interchange* (Pages 26-28), and was mailed to all subordinate units.

Under Article 28, as clarified by the resolution of October 6, 1975, the following expenditures are rebatable:

1. All funds expended, directly or indirectly, on the election of candidates for public office, including contributions to any political party or political organizations; staff time spent during working hours on behalf of any political party, political organization, or candidate for public office; expenditures on behalf of and facilities used for any political party, political organization or candidate for public office; and the prorated portion of the costs of the *Railway Clerk/interchange* and other union publications to cover space devoted to the above.

2. All funds expended, directly or indirectly, on legislative lobbying, including time and expenses of all full or part-time union staff, expenses of unsalaried persons reimbursed by the union, and the per capita tax allocated to the State Legislative Committees.

3. All dues to the AFL-CIO, CLC, and affiliated organizations of either.

4. All contributions to other organizations, including charitable, ideological and educational groups.

5. All expenditures of the Grand Lodge and all subordinate units in connection with the above.

The foregoing categories of expenditures are more inclusive than the rebatable categories under the policy statement of January 24, 1974, in three significant areas:

1. All money from dues and fees allocated by the local lodges to the State Legislative Committees is now classified as rebatable, rather than just that share contributed by the State Legislative Committees to the election of candidates for state and local public office;

2. In addition to the money spent by the State Legislative Committees, all other costs and expenses incurred in lobbying for legislation beneficial to the employes we represent, such as improvements in the Railroad Retirement Act and anti-MAP legislation; and

3. Dues paid by BRAC to the AFL-CIO, CLC, and affiliated labor groups of either.

According to the resolution of October 6, 1975, these additional categories have been included in order to avoid unnecessary bookkeeping burdens which differentiation would require, and in order to reduce the likelihood of unnecessary and burdensome litigation.

As before, however, expenditures financed by the Railway Clerks Political League are not included in this accounting, because RCPL is financed exclusively by voluntary contributions, not dues money or agency fees. Federal law prohibits the use of money obtained from dues and fees in the election campaigns of candidates for federal office so only RCPL money is used in that activity.

II. Summary of Records Reviewed

In order to arrive at an accurate computation of rebatable expenditures for the year 1975, records of the local lodges, system boards and their equivalent, and the Grand Lodge for 1975 were subjected to review. It was unnecessary to review records of the State Legislative Committees because all money allocated to such committees are automatically included as a rebatable expense. Records of the General Chairmen's Associations and District Councils were not reviewed because our knowledge of their operation and our review of their records for previous years have convinced us that those organizations engage in no rebatable activities.

(A) Local Lodges:

A request for certification regarding money and time spent on rebatable activities in 1975 was sent to the Financial Secretary-Treasurer

of each lodge. Such certification was required for these subordinate bodies to facilitate our review. These documents requested specific data as to any expenditures made by the lodge for rebatable activities, and as to any compensated time spent by any officer or employe of the lodge in such activities. Lodges not replying have been reminded of their duty to file this certification. In those instances where certifications were not returned at the time of our review, the audit reports of such units were examined to determine whether expenditures were made for rebatable purposes. No time charges were made against the non-reporting lodges because our experience with the reporting lodges shows that none have incurred rebatable time charges of any significance.

A review process similar to that undertaken with respect to the local lodges was done to determine system board expenditures for rebatable purposes in 1975. The certifications furnished by system boards were checked against audits filed with the International Secretary-Treasurer.

(B) Grand Lodge:

Within the Grand Lodge, the Board of Trustees reviewed the certificates of every officer and member of the staff regarding the amount of time and expense, if any, spent on rebatable activities. Based on these reports, a calculation was made of the expenses, salaries and fringe benefits of those officers, staff and employes who spent a portion of their time on rebatable activities, and of the actual cost of space, equipment and supplies used for such activities. With the aid of the International Secretary-Treasurer's office, we reviewed the expenditures reported in the Haskins & Sells Grand Lodge audit which, in our opinion, might have been of a rebatable nature. Those items determined to be rebatable have been included in our computation. They consist primarily of labor affiliation dues, charitable contributions, legal, publication and office expenses.

With regard to the Grand Lodge's Washington Office, the Board of Trustees determined to allocate all the salaries and expenses of BRAC's three legislative representatives to the "rebatable" category for 1975. This was done even though a significant portion of their time was spent on non-rebatable activities. The Board made this determination because the documentation necessary to make an accurate allocation of the legislative representatives' non-rebatable time and expenses for the past year were not complete. The records which the Grand Lodge officers and staff now keep, however, should permit an accurate allocation in the ensuing years.

(C) **Receipts:**

Our figures showing annual receipts from dues and fees were gathered with the assistance of the staff of the International Secretary-Treasurer. The gross income of local lodges, system boards of adjustment and the Grand Lodge were reviewed based upon their audit reports to arrive at a total which wuld accurately reflect income from dues and fees for the year 1975.

III. Summary

Appearing on Page 29 is a table showing the expenditures by various units of BRAC for rebatable purposes for the year 1975. We believe that the various categories are self-explanatory. When all of the rebatable expenditures in each of the categories for the year 1975 are added together, the total is $1,088,431.14. We have divided that figure by the receipts of dues and fees for 1975, in the amount of $23,264,402.77, to yield the proportion of dues and fees spent for rebatable purposes, which is 4.68%. The minimum standard monthly dues was $11.00 for the period January 1 thru July 31, 1975, and $13.50 on and after August 1, 1975; the weighted average monthly dues for 1975 was, therefore, $12.04. Accordingly, the monthly reduction of dues for objecting members and agency fee paying members is $0.56.

It should be noted that in our previous reports, the receipts and expenditures were averaged out over a running 3-year period. This practice was not followed for 1975 because the expansion of the rebatable categories, announced in the resolution of October 6, 1975, made it impossible to compare the 1975 calculations with the preceding years. The constitutional requirements of making calculations on a 3-year average will be implemented beginning with the year 1975 on the basis of the enlarged categories.

The resolution of October 6, 1975 also calls for a retroactive refund for those members and agency fee payers who filed timely objections during the years of 1972, 1973 and 1974. The refund in those years was calculated to amount to $0.07 per month. On the basis of the calculations for 1975, the difference between the amount refunded and the amount calculated for 1975 is $0.49. This amount will be refunded to all eligible objectors for the appropriate number of months for the period 1972-74.

Signed on April 30, 1976.

/s/ Otis J. Hawthorne
Acting Chairman

/s/ Jack R. Reese
Secretary

/s/ Thomas C. Robinson
Member
/s/ Grady F. Jackson
Member
/s/ W. S. Neas
Member

Reminder—Under Article 28 of the Grand Lodge Constitution, objections to expenditures should be filed within the first 30 days of membership or during the first 30 days of each calendar year. Moreover, objections must be renewed during the first 30 days of each calendar year.

Expenditures by the various units of BRAC for rebatable purposes

	Local Lodges	System Board	Grand Lodge	Total
1. Contributions and expenses in connection with candidates for public office and political parties[1]	$ —	$ —	$ 9,356.88	$ 9,356.88
2. Legislative lobbying:				
(a) Per capita tax payments to State Legislative Committees	441,196.66	34,480.43	—	475,677.09
(b) Other legislative lobbying expenses (except Grand Lodge Washington Office)	—	—	235,816.09	235,816.09
3. Dues and expenses in connection with AFL-CIO, CLC, and affiliated organizations of either	13,481.12	1,824.70	256,599.58	271,905.40
4. Contributions and expenses in connection with charitable, ideological and educational groups	11,899.16	2,391.86	58,071.37	72,362.39
Totals	$480,418.17	$40,597.72	$567,415.25	$1,088,431.14

Total dues, initiation and reinstatement fees received by the various BRAC units

Grand Lodge				$ 9,193,084.05
System Board				8,548,038.36
System Divisions				283,916.00
Local Lodges:	United States	—	$4,818,991.30	
	Canada	—	420,373.06	5,239,364.36
	Total			$23,264,402.77

[1]Not including expenses of Grand Lodge Washington Office, which is reported in Item 2(c).
[2]Includes expenses in connection with both candidates for public office and political parties, and legislative lobbying.

DEFENDANTS' TRIAL EXHIBIT C1

Report of the Board of Trustees for 1976 Pursuant . . .

I. INTRODUCTION

At its Quadrennial Convention in May 1975, the Grand Lodge amended its Constitution by adopting a new Article 28 providing for a reduction in the dues and agency fees of those who object to the use of a portion of their money for political purposes. The Board of Trustees is charged with the responsibility of reviewing the records of all units of the Brotherhood to determine the receipts of dues and agency fees during the past year, the percentage thereof expended on political purposes, and to calculate therefrom the amount of refund each objecting member and agency fee payer is entitled to receive.

Article 28 essentially incorporates the policy statement of BRAC issued by the International President and approved by the Executive Council on January 24, 1974. On October 6, 1975, the Executive Council adopted certain recommendations further implementing and clarifying the Dues Rebate Program for our dissenting members and agency fee payers. These recommendations were announced in a communication from the International President which was published in the November issue of the *Railway Clerk/interchange* (Pages 26-28), and was mailed to all subordinate units.

Under Article 28, as clarified by the resolution of October 6, 1975, the following expenditures are rebatable:

1. All funds expended, directly or indirectly, on the election of candidates for public office, including contributions to any political party or political organizations; staff time spent during working hours on behalf of any political party, political organization, or candidate for public office; expenditures on behalf of and facilities used for any political party, political organization or candidate for public office; and the prorated portion of the costs of the *Railway Clerk/interchange* and other union publications to cover space devoted to the above.

2. All funds expended, directly or indirectly, on legislative lobbying, including time and expenses of all full or part-time union staff, expenses of unsalaried persons reimbursed by the union, and the per capita tax allocated to the State Legislative Committees.

3. All dues to the AFL-CIO, CLC, and affiliated organizations of either.

4. All contributions to other organizations, including charitable, ideological and educational groups.

5. All expenditures of the Grand Lodge and all subordinate units in connection with the above.

The foregoing categories of expenditures are more inclusive than the rebatable categories under the policy statement of January 24, 1974, in three significant areas.

1. All money from dues and fees allocated by the local lodges to the State Legislative Committees is now classified as rebatable, rather than just that share contributed by the State Legislative Committees to the election of candidates for state and local public office;

2. In addition to the money spent by the State Legislative Committees, all other costs and expenses incurred in lobbying for legislation beneficial to the employes we represent, such as improvements in the Railroad Retirement Act and anti-MAP legislation; and

3. Dues paid by BRAC to the AFL-CIO, CLC, and affiliated labor groups of either.

According to the resolution of October 6, 1975, these additional categories have been included in order to avoid unnecessary bookkeeping burdens which differentiation would require, and in order to reduce the likelihood of unnecessary and burdensome litigation.

As before, however, expenditures financed by the Railway Clerks Political League are not included in this accounting, because RCPL is financed exclusively by voluntary contributions, not dues money or agency fees. Federal law prohibits the use of money obtained from dues and fees in the election campaigns of candidates for federal office so only RCPL money is used in that activity.

II. SUMMARY OF RECORDS REVIEWED

In order to arrive at an accurate computation of rebatable expenditures for the year 1976, records of the local lodges, system boards and their equivalent, and the Grand Lodge for 1976 were subjected to review. While it was unnecessary to review records of the State Legislative Committees because all money allocated to such committees are automatically included as a rebatable expense, these records were examined. Records of the General Chairmen's Associations and District Councils were examined even though our knowledge of their operation and our review of their records for previous years have convinced us that those organizations engage in no rebatable activities.

(A) Local Lodges:

A request for certification regarding money and time spent on rebatable activities in 1976 was sent to the Financial Secretary-Treasurer of each lodge. Such certification was required for these subordinate bodies to facilitate our review. These documents requested specific data as to any expenditures made by the lodge for rebatable activities, and as to any compensated time spent by any officer or employe of the lodge in such activities. Lodges not replying have been reminded of their duty to file this certification. In those instances where certifications were not returned at the time of our review, the audit reports of such units were examined to determine whether expenditures were made for rebatable purposes. No time charges were made against the non-reporting lodges because our experience with the reporting lodges shows that none have incurred rebatable time charges of any significance.

A review process similar to that undertaken with respect to the local lodges was done to determine system board expenditures for rebatable purposes in 1976. The certifications furnished by system boards were checked against audits and run-off sheets filed with the International Secretary-Treasurer.

(B) Grand Lodge:

Within the Grand Lodge, the Board of Trustees reviewed the expense accounts and certificates of every officer and member of the staff regarding the amount of time and expense, if any, spent on rebatable activities. Based on these reports, a calculation was made of the expenses, salaries and fringe benefits of those officers, staff and employes who spent a portion of their time on rebatable

activities, and of the actual cost of space, equipment and supplies used for such activities. We also reviewed all other expenditures made during the past year. Those items determined to be rebatable have been included in our computation. They consist primarily of labor affiliation dues, charitable contributions, legal, publication and office expenses.

With regard to the Grand Lodge's Washington Office, the Board of Trustees, in accordance with past practice, determined to allocate all the salaries and expenses of BRAC's three legislative representatives to the "rebatable" category for 1976.

(C) Receipts:

Our figures showing annual receipts from dues and fees were gathered with the assistance of the staff of the International Secretary-Treasurer. The gross income of local lodges, system boards of adjustment and the Grand Lodge were reviewed based upon their audit reports to arrive at a total which would accurately reflect income from dues and fees for the year 1976.

III. SUMMARY

Reproduced is a table showing the expenditures by various units of BRAC for rebatable purposes for the year 1976. We believe that the various categories are self-explanatory. When all of the rebatable expenditures in each of the categories for the year 1976 are added together, the total is $1,249,259.97.

Total dues, initiation and reinstatement fees received by the various BRAC units during 1976 was $24,509,683.46. Corresponding figures for 1975 were receipts of $23,264,402.77 and rebatable expenses of $1,088,431.14. Adding these figures together we arrive at average receipts and expenditures for the years of 1975 and 1976 as follows:

Receipts	$23,887,043.12
Rebatable Expenditures	1,168,845.56

We have divided the average rebatable expenditures by the average receipts to yield the percentage of dues and fees spent for rebatable purposes and determined the percentage to be 4.9%.

The amount of rebate to individuals requesting same is the percentage as determined above times the amount an individual paid as full dues in 1976.

The constitutional requirement of making calculations on a 3-year average will be fully implemented beginning with the year 1977 on the basis of the enlarged categories.

As noted above, for the year 1976 we have used the average of 1975 and 1976.

Signed on April 22, 1977

/s/ Thomas C. Robinson
Acting Chairman

/s/ Jack R. Reese
Acting Secretary

/s/ W. S. Neas
Member

/s/ P. J. Meier
Member

Expenditures by the Various Units of BRAC for Rebatable Purposes

	Local Lodges	System Boards	Grand Lodge	1976 Total	1975 Total
1. Contributions and expenses in connection with candidates for public office and political parties[1]	$ —	$ —	$ 40,477.90	$ 40,477.90	$ 9,356.88
2. Legislative lobbying:					
(a) Per capita tax payments to State Legislative Committee	434,062.55			434,062.55	475,677.09
(b) Other legislative lobbying expenses (except Grand Lodge Washington Office)	28,145.34	2,281.09	50,963.66	81,390.09	23,313.29
(c) Grand Lodge Washington Office[2]			295,522.83	295,522.83	235,816.09
3. Dues and expenses in connection with AFL-CIO, CLC, and affiliated organizations of either	13,076.82	2,202.00	324,048.99	339,327.81	271,905.40
4. Contributions and expenses in connection with charitable, ideological and educational groups	14,047.44	2,184.00	42,247.35	58,478.79	72,362.39
TOTALS	$489,332.15	$6,667.09	$753,260.73	$1,249,259.97	$1,088,431.14

Total Dues, Initiation and Reinstatement Fees Received by the Various Units of BRAC

Grand Lodge	$ 9,500,089.88	$ 9,19?,084.05
System Boards	9,350,498.34	8,548,038.36
Local Lodges & System Divisions	5,659,095.24	5,523,280.36
TOTALS	$24,509,683.46	$23,264,402.77

[1]Not including expenses of Grand Lodge Washington Office, which is reported in Item 2(c).

[2]Includes expenses in connection with both candidates for public office and political parties, and legislative lobbying.

DEFENDANTS' TRIAL EXHIBIT CJ

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
AFL-CIO — CLC ***D. A. BOBO, International Secretary-Treasurer***

File: 538-1-25

Subject: Rebate for Political and Other Expenditures

May 16, 1977

Susan Allen
3967 Sacramento #5
San Francisco, California 94118

Greetings:

According to our records in the cases of *Ellis v. BRAC* and *Fails v. BRAC*, you submitted an objection to the expenditure of dues or agency fees for political and other purposes.

The report of the Board of Trustees for the year 1976, which will be printed in the May-June issue of the *Railway Clerk/interchange*, determined the percentage of rebatable expenses and salaries to be 4.9%. Applying this percentage to your fifteen dollar dues rate for 1976 yields a refund of seventy-three cents due you for each month in which full dues were remitted during 1976. Records furnished by your lodge show that during 1976 you paid dues or agency fees for 12 months. Consequently, the amount of refund due you for 1976 is $8.76.

The refund sent to you last year for the period covering July 1972 - December 1975 was computed on the basis of the minimum dues charged by the Union during that period. However, your dues rate was increased to fifteen dollars effective June 1975, but due to inadvertence, that increase was not taken into consideration when your refund was calculated. We are now correcting that error. According to our records, between July 1, 1972 and December 31, 1975 you paid dues or agency fees totaling $90.00. By recomputing your actual dues for that period and recalculating the percentage at 4.9% it has been determined that the additional amount of $1.10 is due you for the period July 1, 1972 through December 31, 1975 under the rebate policy. This additional amount was

arrived at by recalculating the total dues paid for the period July 1, 1972 through December 31, 1975 at 4.9% and subtracting therefrom the rebate you received last year.

Consequently, the total refund due you is $9.86. A check for that amount is enclosed.

Under the dues rebate program, you have the right to appeal to the Public Review Board the amount of your refund. Cashing of the enclosed check will not be deemed a waiver of your right to appeal.

Sincerely and fraternally,

D A Bolo

International Secretary Treasurer

Enclosure

cc: Mr. Fred J. Kroll, IP

DEFENDANTS' TRIAL EXHIBIT CS

REBATABLE SALARIES AND EXPENSES
YEAR 1977

Name	Salary	Expenses	Total
Archual, A.	$	$ 1,312.38	$ 1,312.38
Bernard, D.	181.74		181.74
Bishop, S.	435.12	898.75	1,333.87
Bobo, D.	258.20	560.00	818.20
Borrelli, J.	83.52		83.52
Campbell, J.	210.15	609.82	819.97
Carter, C.	483.60	340.97	824.57
Coleman, C.	300.04	162.19	462.23
Condo, L.	1,186.92		1,186.92
Crispell, R.	8.47		8.47
Curry, D.	235.69	264.01	499.70
Devlin, R.	219.26	72.45	291.71
Donlon, W.	92.32	227.50	319.82
Dyck, T.	17.82	14.50	32.32
Dysart, W.	186.80		186.80
Farrell, M.	268.54		268.54
Fitzgibbon, T.	265.42	630.28	895.70
Gonzalez, T.	115.93		115.93
Granlund, W.	300.04	151.70	451.74
Hannah, B.	25.12		25.12
Hensley, S.	1,500.07		1,500.07
Hidey, B.	2,703.95	433.31	3,137.26
Hirsh, S.	34.62		34.62
Ippolito, F.	4.14		4.14
Janczewski, P.	351.70		351.70
Jordan, G.	63.53		63.53
Kilroy, R.	207.72	650.78	858.50
Kravetz, C.	120.43		120.43
Kroll, F.	788.43	1,552.51	2,340.94
Lockhart, D.	900.12	940.85	1,840.97
Long, R.		32.90	32.90

Name	Salary	Expenses	Total
Lynch, F.	$ 230.80	$ 782.84	$ 1,013.64
McCauley, A.	21.12	226.46	247.58
McGraw, P.	140.40		140.40
Meier, P.	25.74	135.18	160.92
Neal, E.	230.80	147.47	378.27
Neas, W.	23.76	170.48	194.24
Newberry, S.	1,574.13		1,574.13
Norton, R.	815.85	1,193.67	2,009.52
Otero, J.	2,977.32	3,454.82	6,432.14
Reese, J.	21.78	99.44	121.22
Reynolds, E.	30.03	127.12	157.15
Robinson, C.	856.64	192.02	1,048.66
Robinson, T.	34.32	552.64	586.96
Simpson, P.	95.53		95.53
Snow, S.	231.00		231.00
Spieker, P.	126.68	98.85	225.53
Stewart, P.	203.31		203.31
Swain, W.	21.78	69.96	91.74
Thias, E.	181.30	106.50	287.80
Toppen, G.	230.80	340.71	571.51
Vasturia, P.	395.55	146.92	542.47
Williamson, W.	235.69	152.35	388.04
Wilson, E.	118.71	16.80	135.51
TOTAL	$20,372.45	$16,869.13	$37,241.58

DEFENDANTS' TRIAL EXHIBIT CV

Rebatable Expenses

1977

Salary and Expenses (Exclusive of Legislative Fund)	$ 37,241.58
Fringe Benefits on Salaries (37,241.58 @ 35%)	13,034.55
General Fund	
580-581	
Rent on Office Equipment	820.37
580-585	
Express	64.92
580-586	
Printing and Office Supplies	1,673.50
610-613	
Consultants	12,456.79
620-621	
AFL-CIO	166,338.74
620-622	
Canadian Per Capita	41,724.60
620-625	
Maritime Trades	3,060.00
620-626	
International Trade Federation	29,970.00
620-627	
Railway Labor Executives Association	85,843.00
620-628	
Professional Employes AFL-CIO	930.00
630-636	
Scholarship	3,525.00
660-661	
Contribution	15,361.19
660-661	
Contribution - Political	8,435.20
660-668	
Banquets and Luncheons	9,015.08

General Fund (Continued)	
660-674	
Foreign Travel	$ 3,289.26
Protective Fund	
610-611	
Legal Fees	55,732.11
620-626	
Canadian Railroad Labour Association	13,800.00
Publication Fund	
600-601	
Printing	9,558.73
610-614	
Bulletin	903.11
Legislative Fund	240,308.68
	$753,086.41

REBATEABLE LEGAL 1976

VOUCHER	PAYEE	AMOUNT
7086	RLEA	$ 2,001.17
7364	Highsaw	95.97
7699	Wayne Hartke	500.00
7701	RLEA	2,371.30
7762	Wayne Hartke	500.00
5609C	Soloway Wright	225.00
8585	RLEA	1,233.12
8642	Highsaw	529.21
8643	Wayne Hartke	500.00
9179	Wayne Hartke	500.00
9182	RLEA	688.79
9508	Highsaw	739.82
9720	RLEA	3,149.41
9726	Highsaw	356.26
9970	RLEA	953.26
10024	Wayne Hartke	500.00
10341	Highsaw	454.00
10724	Wayne Hartke	500.00
11247	Wayne Hartke	500.00
11283	RLEA	2,210.32
11284	RLEA	803.94
11308	Highsaw	409.26
11393	RLEA	4,618.41
11670	Wayne Hartke	500.00
12011	RLEA	2,871.02
12301	Wayne Hartke	500.00
12303	Highsaw	561.65
12610	RLEA	2,911.69
12677	Highsaw	148.90
13095	RLEA	4,649.85
13096	RLEA	362.50
13097	Bodle, Fogel, Julber	481.25
13422	Wayne Hartke	500.00
13583	RLEA	1,217.17
13613	Wayne Hartke	1,000.00
		$40,043.27

REBATEABLE LEGAL 1977

VOUCHER	PAYEE	AMOUNT
14299	RLEA	$ 1,784.17
14496	Zil Lipsen	2,837.16
14574	Highsaw	515.02
15049	Highsaw	1,140.12
15558	Highsaw	379.10
15939	RLEA	2,628.23
15993	Highsaw	1,822.19
14649	RLEA	2,085.37
17099	Highsaw	169.94
17656	Highsaw	253.96
18339	Highsaw	213.00
18340	Highsaw	83.11
19849	Highsaw	415.05
20425	Highsaw	1,359.42
136C	Receiver-General Canada	3.00
		$15,688.84

Office Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD ELLIS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

ALLEN L. FAILS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The opinions below, the basis of this Court's jurisdiction and the constitutional and statutory provisions involved are set out at pp. 1-2 of the petition for a writ of certiorari ("Pet.") and at p. 36a of the separately bound appendix to the petition ("Pet. App.")

STATEMENT OF THE CASE

This suit by a group of Western Airlines employees challenges their obligation to pay "union dues" in the amount provided for in a collective agreement between their employer and their exclusive bargaining representative—the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC").[1]

On January 21, 1976, the district judge entered an interlocutory summary judgment in favor of the plaintiffs, ruling that under the Railway Labor Act, 45 USC § 151 *et seq.*, the several types of union activity identified in Paragraph 22 of that court's accompanying findings of fact constitute "non-collective bargaining activities" objecting employees need not financially support. (Pet. App. 22a, 24a, 25a-26a.) Paragraph 22 excludes from the dues payment obligation not only the costs attributable to union political activities and ideological activities unrelated to collective bargaining but also normal union operating costs including the entire amount for conventions, journals, litigation, social activities, death benefits and organizing.

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[1] We have placed the term "union dues" in quotation marks because the petitioners in this case include employees who, at the relevant time, were union members and whose challenge concerns the amount of their union dues, and other employees who, at the relevant time, were not union members but because of the union security clause of the collective agreement were paying fees in the same amount as union dues and whose challenge concerns the amount of those fees. For simplicity's sake we use the term "union dues" throughout.

After the ensuing trial, the district court determined that the employees' undisputed right of abstention from supporting union political activities and ideological activities unrelated to collective bargaining is fully protected under the union's internal system. (Pet. App. 31a.) And, that court's judgment requires the reduction each year of petitioners' dues obligation by the ratio of such expenditures to total expenditures in the previous year. (Pet. App. 34a, ¶ 3.)

The court of appeals affirmed the district court's decision and judgment with respect to the union's internal system. (Pet. App. 5a-6a.) The court of appeals, however, reversed the district court's Paragraph 22 ruling, holding that objecting employees are required to bear their share of the union's operating expenditures covered therein. (Pet. App. 9a-14a.)

REASONS FOR DENYING THE WRIT

In this case, the court of appeals was called on to apply the general principles, concerning the limits of the financial obligation that may be imposed under a union security clause permitted by the Railway Labor Act, declared in *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, *Machinists* v. *Street*, 367 U.S. 740, *Railway Clerks* v. *Allen*, 373 U.S. 113. The decision below is the initial one by any appellate court particularizing the lessons of *Hanson*, *Street* and *Allen* in order to determine the precise types of union activity that an objecting employee need not support financially. The task of applying the general rules of law articulated by this Court to particular situations is, of course, one that is regularly left to the lower courts. And, in this instance, the court of appeals proceeded in a manner entirely faithful to this Court's rulings.

Moreover, because of the comprehensive coverage of the union's internal system for relieving objecting employees of the obligation to support union political activity and ideological activity unrelated to collective bargaining, and

the prospective relief provided by the district court's judgment, the decision below provides extremely broad protection for the right of such employees to abstain from supporting such activities. Petitioners' assertion that they are required to make payments to the union that may be used for political and ideological activity and only thereafter returned, on which a claimed conflict in the lower courts is predicated, is simply inconsistent with the judgment below. (See p. 7 *infra*.) And the contention that the issues raised by this Railway Labor Act case are of pervasive importance disregards the critical fact that the state court decisions cited (Pet. App. 37a-40a) arise under a variety of *state statutory schemes*, and declare no constitutional principle inconsistent with the decisions below.

In short, there is no conflict in the appellate decisions, or with this Court's decisions, and the petition for a writ of certiorari should be denied.

I. BOTH LOWER COURTS CORRECTLY CONCLUDED THAT IN THE AREA OF UNION POLITICAL AND IDEOLOGICAL EXPENDITURES, PETITIONERS' RIGHTS ARE FULLY VINDICATED UNDER THE UNION'S COMPREHENSIVE INTERNAL SYSTEM.

The limits of the financial obligation that may, consistent with the Railway Labor Act as construed by this Court in *Hanson*, *Street*, and *Allen*, be provided for in a union security clause are succinctly stated in *Abood* v. *Detroit Board of Education*, 431 U.S. 209:

> In *Street* * * * the record contained findings that the union treasury to which all employees were required to contribute had been used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." 367 U.S., at 744.

The Court recognized, *id.*, at 749, that these findings presented constitutional "questions of the utmost gravity" not decided in *Hanson*, and therefore considered whether the Act could fairly be construed to avoid these constitutional issues. 367 U.S., at 749-750. The Court concluded that the Act could be so construed, since only expenditures related to the union's functions in negotiating and administering grievances and disputes fell within "the reasons . . . accepted by Congress why authority to make union-shop agreements was justified," *id.*, at 768. The Court ruled, therefore, that the use of compulsory union dues for political purposes violated the Act itself. Nonetheless, it found that an injunction against enforcement of the union-shop agreement as such was impermissible under *Hanson*, and remanded the case to the Supreme Court of Georgia so that a more limited remedy could be devised.

* * * *

* * * To be required to help finance the union as a collective-bargaining agent might well be thought * * * to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the *Hanson* case, *sub silentio*." *Machinists* v. *Street*, 367 U.S., at 778 (Douglas, J., concurring). [431 U.S. at 219-220, 222-223.]

The courts below were clearly correct in concluding that the union's internal system at issue here satisfies this

Court's directive that objecting employees covered by a union security clause not be required to support union political activity and ideological activity unrelated to collective bargaining.

In adopting the internal system, BRAC's Executive Council sought to "provide the broadest possible respect for personal choices in the area of politics and ideology," including "every level and kind of union expenditure and disbursement" and "fair internal union procedure and remedy for the employee who believes the rebate offered him is inadequate" (CR 291 Ex. CA; see also Ex. CE, CF).[2] Consistent with its purpose of providing "the very best rebate program, the most liberal of any union" (RT 934; see also RT 910, 934-36, 951-53), BRAC's plan includes every category of political, legislative and lobbying expenditure, as well as all other ideological expenditures and all dues and contributions to other labor federations, organizations or charities, of whatever kind (CR 291 Ex. CA).[3]

On the basis of extensive trial testimony and exhibits the district court, in findings and conclusions affirmed by the court of appeals, ruled that petitioners' right to refrain from financial support of union political activity and ideological activity unrelated to collective bargaining is fully protected:

> 4. On October 6, 1975, BRAC adopted a rebate plan encompassing all political and legislative expenditures

[2] "CR" citations refer to the docket entries and exhibits in the district court; "RT" citations refer to the trial transcript.

[3] Indeed, the system covers expenditures that under the decided cases probably need not be included, and that the BRAC Executive Council believed were direct collective bargaining disbursements (RT 910, 933-34, 951-52, CR 291 Ex. CA, CE). For example, although this Court's decision in *Abood* identifies as non-chargeable only ideological activities "unrelated to collective bargaining" (431 U.S. at 236), BRAC's system includes *all* expenditures for legislative and regulatory agency activity, no matter how intimately related to collective bargaining.

of the Grand Lodge and subordinate units, as well as all ideological expenditures and all dues and contributions to other labor federations, organizations and charities. That plan is a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963). The Grand Lodge Board of Trustees annually computes political-ideological rebates due to any protesting dues payer for the prior calendar year. These are computed on the basis of forms submitted by subordinate units and upon reports of political time and expenditures by Grand Lodge personnel which are contemporaneously logged on the Grand Lodge computer system throughout the calendar year. Any employee who believes his rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals. Members of the Board include former Governor Edmund G. Brown, Dame Soia Mentschikoff and Reverend Preston Bradley.

The Board of Trustees' computation for calendar year 1975 disclosed that 4.68% of the Union's total income from dues and fees had been expended for items included in the rebate plan, and each plaintiff in this suit was sent a refund check for that proportion of his 1975 dues payment, as well as for each earlier year back to the date of his initial dues protest. The rebate computation for 1976 was 4.9%, and each plaintiff was then sent that amount for 1976 plus the amount necessary to increase to 4.9% the rebate for each prior year since his protest. Plaintiffs have also been sent their rebates for 1977, amounting to 5.4% of their dues payments in that year. No plaintiff has appealed to the Public Review Board, although each has been advised of his right of appeal.

5. On the basis of the above finding, the Court concludes that plaintiffs' rights in the political-ideological

> area have been vindicated by the rebates they have received and are protected for the future by the rebate plan [Pet. App. 30a-31a].

Moreover, the union's internal system is supplemented by the district court's judgment which *"reduces the dues payment obligation of any plaintiff for each calendar year" by the "preceding calendar year['s]" ratio of union political and ideological expenditures to total union expenditures.* (Pet. App. 34a; emphasis added.) Thus, the system approved by the district court, embodied in its judgment, and affirmed in this respect by the court of appeals, does not, as the petition claims, "allow[] for the collection and expenditure of compulsory dues and fees for purposes and activities which BRAC recognizes as being beyond those which can be lawfully charged to protesting employees of Western Airlines." (Pet. 20.) Rather, the district court's judgment tracks this Court's suggestion in *Allen*, 373 U.S. at 122, of a "practical decree," by providing both for a "refund" from dues already paid and for a "reduction of future [dues]." The question whether a straightforward rebate system is, as petitioners contend, legally inadequate is academic in this case.[4]

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[4] None of the cases cited in the petition (at pp. 22-25) provide more protection for objecting employees than the judgment here provides or otherwise support the claim made in the petition of a lower court conflict warranting this Court's review. Of the two state court decisions only *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180, is by the state's highest court. And *Greenfield* concerned the financial obligations that may be imposed on objecting employees *prior* to a determination of the amount such an employee is obligated to pay and does not even address the situation presented here which concerns the type of order that may be entered *after* such a determination. With regard to the other three cases cited in the petition, it suffices to say that one is an interlocutory decision by a state intermediate appellate court and two are interlocutory decisions by federal district courts. Such decisions, of course, do not—even if they supported petitioner's position that the judgment here is inadequate (which they do not)—create the type of conflict this Court sits to resolve.

II. THE COURT OF APPEALS' APPLICATION OF THE CORRECT LEGAL STANDARD TO THE PARTICULAR FACTS OF THIS CASE PRESENTS NO ISSUE WARRANTING REVIEW.

(a) The court of appeals noted that the objecting employees

> argue that they cannot be charged for certain major operating expenditures of the union * * *. Expenditures for these activities are not "political" or "ideological" and thus not governed by the narrow holdings of *Street* and *Abood*. Nonetheless, appellants interpret language in those and other opinions as indicating that such expenditures are not part of the collective bargaining and grievance administration costs to which objecting employees can be required to contribute. [Pet. App. 3a, 4a.]

That court, while recognizing that this Court has not yet "delineat[ed] the boundaries of acceptable mandatory dues provisions," carefully reviewed this Court's *Hanson*, *Street*, *Allen* and *Abood* decisions for guidance and on the basis of that review concluded:

> Language in other Supreme Court decisions supports a broader concept of collective bargaining [than that urged by the objecting employees]. *Allen* refers to the oblegation to support "activities *germane* to collective bargaining," 373 U.S. at 122, 83 S.Ct. at 1163 (emphasis added); *Abood* cited that language with approval, 431 U.S. at 239 n.40, 97 S.Ct. at 1802 n.40. *Hanson* noted that an employee has the duty to support the "work of the union *in the realm* of collective bargaining." 351 U.S. at 235, 76 S.Ct. at 719 (emphasis added). *Hanson* also acknowledged that Congress has the power "to require . . . the beneficiaries of trade unionism to contribute to its costs," *id.*, and specifically upheld "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work." *Id.* at 238, 76 S.Ct. at 721. These words support a broader definition of the collective bargaining concept than that urged by appellants. * * *

> * * * Based on our reading of *Hanson*, *Allen*, and *Abood*, however, we believe that the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. This formulation respects and protects dissenters' rights, but does not needlessly weaken the union, whose viability is necessary to secure and maintain industrial peace. [Pet. App. 10a]

Petitioners make no showing that the court of appeals' conclusion is unfaithful to the Railway Labor Act as construed by this Court.

(b) The court below not only followed the correct legal standard but properly applied that standard—as we now briefly show, adhering to the sequence that court followed in discussing the challenged expenditures.

(i) In concluding that the union's quadrennial national convention is part and parcel of the union's performance of its bargaining role (Pet. App. 11a), the court below followed *Street's* lead. For this Court noted there that the RLA's legislative history shows an intent to have union shop fees "cover convention expenses." (367 U.S. at 766.)[5]

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[5] As Prof. Lloyd Ulman, an eminent labor economist who directs the Institute of Industrial Relations, University of California, stated: "National unions tend to be large, pluralistic organizations in which substantive differences in economic priorities have to be hammered out among the members * * *. Union elections and conventions provide a means for arriving at a consensus of all of the myriad issues which affect local and national bargaining strategies" (CR 155 Ex. U, at 10).

The accuracy of that statement is demonstrated by BRAC's last convention held prior to the trial below, most of which was devoted to reports, debates and voting on contract bargaining, grievance handling, and employee wage and benefit issues. One of the first events of the convention was a report on national negotiations, including progress on wages, retirement benefits, the health and welfare plan, cost of living increases, job stabilization and grievance handling (CR 155 Ex. S, at 14-19). The convention spent hours on employee retirement problems (e.g., *id.* at 149-58); interest on back pay due as a result of national wage contract or agreement violations (160-61); stabilization of employment, longevity pay, shift differ-

(ii) Recognizing the close connection of union litigation to the performance of the union's bargaining functions, the court below properly concluded that there is no basis for giving employees "a free ride as to these non-political expenses which are related to the union's work as the collective bargaining agent" (Pet. App. 12a).[6]

(iii) The costs of the union's publications, particularly its monthly journal, "The Railway Clerk/Interchange," which is the only direct communications link with the 200,000 employees the national union represents, is also related to its representation functions. Not only is the journal the place for reporting such significant events as the initiation and outcome of negotiations, but it is also the means of educating employees on collective bargaining developments and issues and of distributing ballots on negotiation priorities and strikes.[7]

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entials, holiday pay; sick leave, bereavement pay, retention of seniority, and strike ballots (161-169, 246-258); employee passes on buses, railroads and airlines, as well as birthday-holidays and flexitime arrangements (350-376); employer mutual aid pacts, protection for employees in airline mergers, cost of living increases in retirement benefits (321-335); strikes (319-321); and ratification of nationally negotiated bargaining agreements (399-405).

The court below properly concluded that such convention deliberations "guide the union's approach to collective bargaining and are directly related to its effectiveness in negotiating labor agreements" (Pet. App. 11a).

[6] A trial exhibit listing all of the union's ongoing litigation showed a number involving direct issues over contract interpretation. Another major group of cases involved employee claims that the union (or the union and the employer) violated the duty of fair representation or Title VII of the 1964 Civil Rights Act, in restricting the complaining employees' working rights. The remaining cases involved actions by the union to protect employee interests, including suits challenging the Mutual Aid Pact in the airline industry, to protect employees in carrier bankruptcy proceedings, and to impose trusteeships on subordinate bodies to assure observance of the governing rules.

[7] Journals in the record include explanations of specific contract demands in national negotiations (e.g., CR 155 Ex. K, p. 4; Ex. N, p. 2); announcement of deadlock in negotiations and appointment

(iv) A final area of expenditures the court below found germane to collective bargaining is the union's effort to extend organization among the employees of additional employers, on the principle that "[m]aximum organization of an industry benefits employees and units already organized" (Pet. App. 13a). This Court has repeatedly recognized that reality. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, holds that the antitrust laws do not prohibit union activities that result in "elimination of price competition based on differences in labor standards," precisely because a union "to be effective * * * must eliminate the competition from non-union made goods." (*Id.*, at 503.) See also *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 ("employees must make their combination extend beyond one shop"); *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 575, n.24 (unions "have a legitimate and substantial interest in continuing organization efforts after recognition").[8] Like the other areas

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of a federal mediator (CR 155 Ex M, pp. 2, 6); news of a strike ballot and an explanation of issues involved in the potential strike (CR 155 Ex. N, pp. 2,4); announcement of the outcome of a strike vote and appointment of a Presidential factfinding board (CR 155 Ex. O, pp. 2, 4); and successful conclusion of negotiations (CR 155, Ex. Q, pp. 4-5). Significant events for individual system boards and locals are also reported, particularly newly negotiated contracts and their major terms; for example, pacts with Western Airlines (CR 155 Ex. Q, pp. 8-9), Northwest Airlines (CR 155 Ex. O, pp. 10-11), the Dreyfus Corporation (CR 155 Ex. P, p. 7) and Western Pacific Transport (CR 155 Ex. L, p. 11). To make the publication readable, about a third of its total content includes news on general economic matters, historical notes, consumer advice, and similar items intended to make the magazine appealing to its employee audience. The court below properly found that such matter "does not detract from the publication's value in the collective bargaining process" as the "effective means of communication" between the union and the employees the union represents (Pet. App. 12a).

[8] As Prof. Ulman explained "Dues expenditures on organization also play a central role in the collective bargaining process. * * * If some employers within the relevant market are unorganized, they may pay substantially lower wages, be subject to fewer restrictions on the use of labor, and have substantially lower labor costs. That

of union operating costs sustained by the court below as germane to collective bargaining, organizing, then, advances successful collective bargaining for employees already organized.[9]

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competitive advantage * * * would inevitably be reflected at the bargaining table in reduced ability to pay wages and other benefits * * *." (CR 155 Ex. U, at 11-12).

Incomplete unionization may imperil not just the pay and benefits of organized workers but their very jobs as illustrated by the in-flight service operations of the Marriott Corp. (CR 155 Ex. G, at 5). Marriott's operations compete in the same product and labor markets as those of Northwest Airlines, and the wage differential between organized Northwest employees and unorganized Marriott employees worked to the detriment of the former when Northwest was able to buy inflight services from Marriott for less than it could provide them with its own employees. The result was loss of work for Northwest employees represented by BRAC; to avoid further loss of work, BRAC endeavored to organize the Marriott employees.

[9] The court of appeals also rejected the objecting employees' challenges to paying for the union's social activities for its employees and for the union's death benefits program. We treat with these two challenges, each of which concerns relatively small sums of money, in this footnote.

The union's social activities, similar to those that organizations generally provide for the benefit of their staff and officers—occasional banquets, staff retirement luncheons, Christmas parties and the like—are the ordinary amenities to the union's employees commonly provided by all employers to promote staff solidarity and harmonious working relationships, and are allowable business expenses for internal revenue purposes (see CR 155, at 70-72). The Union could hardly be called profligate when, as the court below emphasizes, total social costs amount to less than one percent of its expenditures (Pet. App. 13a).

The national union's death benefits program, which includes all employees, reflects a function that many unions have performed from their earliest days, when employers failed to provide basic protections for workers, and it substitutes for similar collectively bargained benefits. As noted by one authority, "Unions in this country originated as a means of providing mutual aid and protection to their members in the form of low-cost life insurance, pensions, burial grants, and assistance to widows and orphans, as well as to bargain collectively with employers, for higher wages and better

(c) Petitioners, moreover, make no showing that the challenged areas of union expenditure are not germane to collective bargaining (Pet. 9-16). They say nothing whatever about litigation, and only that the court below gave a "whimsical description of social activities" (Pet. 15, n.15). As far as death benefits are concerned, their complaint appears to be the stale claim of exclusion from participation (Pet. 14)—a claim put to rest by a 1975 directive by BRAC President Dennis, disseminated to all dues payers, providing full equality of participation in all BRAC's economic benefits and programs (CR 291 Ex. CB). Petitioners do assert that conventions, publications and organizing are "imbued with an overwhelmingly, ideological essence" (Pet. 14), but they give no basis for suggesting that organizing is ideological and their reference to the "overwhelmingly political focus of union publications and convention activities" is as shown above (pp. 9-11) contrary to fact.

III. PETITIONERS' "STANDARD OF PROOF" ISSUE IS INCONSEQUENTIAL ON THIS RECORD, AND IS WITHOUT FOUNDATION IN THE PRECEDENT ON WHICH THEY RELY.

Petitioners contend that the lower courts erred in accepting "the preponderance of the evidence standard as the appropriate allocation of the burden of proof" (Pet. 17); according to petitioners the defendants should have

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working conditions," J. Mitchell, *Organized Labor* 104 (1903). It is also clear that death benefit plans would be damaged if objecting employees could opt out of participation. This was graphically demonstrated in the early days of insurance with the collapse of insurers that followed a method of risk sharing known as "Assessment Insurance," see T. O'Donnell, *History of Life Insurance In Its Formative Years* (1936). This Court itself has recently declined to permit religious dissenters to remain outside of a federal retirement system because "[w]idespread individual voluntary coverage * * * would undermine the soundness" of the general benefits program, *United States* v. *Lee*, 455 U.S. 252, 258.

been required to "show by clear and convincing evidence from records maintained in accordance with generally accepted accounting principles the amounts spent from those dues and fees for contract negotiation and administration and grievance adjustment" (Pet. i). Review of this issue is likewise entirely unwarranted.

In their zeal to have this Court grant review of the judgment below, petitioners overlook their own concession in the trial court that the standard of proof is inconsequential on this record. On the last day of testimony at the trial the court asked petitioners' counsel, "[A]re you claiming that any substantial political expenditure, straight political expenditure, has not now been refunded?" and Mr. Merrill conceded, "I have no basis to make that claim, your Honor" (RT 1103).[10]

Petitioners' proposed "clear and convincing evidence" standard is also without legal substance. It is mistakenly contended that the decision below is inconsistent with *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (Pet. 18-19). But *Gertz* assuredly did not decide that "because [an] allegedly defamatory statement is directed at a private individual, First Amendment standards are not applicable." (Pet. 19). In *Gertz*, the Court, disagreeing with the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, ruled that private individuals suing for defamation need not establish by clear and convincing evidence that the defamatory statement was made with knowledge of its falsity or in reckless disregard for the truth, the bur-

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[10] Moreover, the petitioners' contention that BRAC's records "were not maintained in accordance with generally accepted accounting principles" (Pet. 17, see also Pet. 19) is wholly without foundation. The district court accepted BRAC's accounting procedures (Pet. App. 30a-31a, ¶ 4), and its order for determining "the annual reduction amount" accepts, too, the "regular accounting records of the Grand Lodge [of BRAC] which are subject to independent annual auditing" and also requires that official and staff time records "be kept on the basis of a time study or other investigation establishing generally accepted accounting standards * * *." (Pet. App. 31a, ¶ 10).

den imposed on public officials and public figures in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and reaffirmed in *Gertz*, 418 U.S. at 342. But the *Gertz* Court did *not*, as petitioners argue, hold the First Amendment inapplicable to defamation suits by private individuals. To the contrary the Court relied on the First Amendment in precluding liability without fault and in circumscribing the damage remedy in such suits (418 U.S. at 347-350). In so holding, the Court explained:

> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. [418 U.S. at 349]

Accordingly, *Gertz* itself squarely refutes petitioners' contention that the preponderance-of-the-evidence standard is inapplicable in any case in which one party's First Amendment interests are at stake (Pet. 17-19). It is petitioners and not the court below, as the petition claims (Pet. 18-19), who have misread *Gertz*.[11]

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[11] Petitioners' contention that they are entitled to have their claim decided on a "clear and convincing evidence" standard is insubstantial for two additional reasons. First, petitioners cite no decision of this Court (and we are aware of none) in which this burden has been imposed on a *defendant*, who ordinarily would be entitled to prevail unless the plaintiff establishes his claim by at least a preponderance of the evidence. More fundamentally, in defamation suits by public officials and public figures against the press, there is a First Amendment interest on only one side—that of the defendant. In actions to determine what proportion of compulsory union dues are reimbursable, there are First Amendment interests on both sides. Petitioners simply ignore the countervailing First Amendment rights of the non-objecting members of defendant unions, although these interests have been recognized by this Court from *Street*, 367 U.S. at 772-773 through *Abood*, 431 U.S. at 238.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States

October Term, 1982

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Respondents.

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v.

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PETITIONERS' REPLY BRIEF

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v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

Pursuant to Sup. Ct. R. 22.5, petitioners Howard Ellis, *et al.*, and Allen L. Fails, *et al.*, file this reply brief in support of the petition for writ of certiorari.

I

PROPER DELINEATION OF UNION ACTIVITIES CHARGEABLE TO DISSENTERS IS A QUESTION OF LAW

BRAC[1] has attempted to portray the Ninth Circuit's holding that expenditures for organizing, conventions and publications, litigation, the death benefit program, and Grand Lodge social activities are chargeable to dissenting employees as a factual question. (*See* Opp. at 8-13).[2] The reasoning of both the district court and the Ninth Circuit in deciding whether those expenditures are chargeable under Railway Labor Act § 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976), was founded upon their reading of *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1962), and *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 78 Lab. Cas. ¶ 11, 290 (S.D. Cal. January 21, 1976) (App. at 24a);[3] *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d 1065, 1072 (9th Cir. 1982) (App. at 9a-10a).

The Ninth Circuit, in reviewing the chargeability of the paragraph 22 expenditures at issue recognized the *definitional* problem in drawing the line between chargeable and non-chargeable activities. *Id.* The court rejected petitioners' argument that the first amendment implications inherent in the collection and use of compulsory dues and agency fees payments from protesting employees require that chargeable expenditures be limited to payments directly related to contract negotiation, contract administration, and grievance adjustment.

The Ninth Circuit ruled as a matter of law that the standard of chargeability is whether a particular expenditure is "germane to the union's work in the realm of collective bargaining," *id.* (App. at 10a), a nebulous test making virtually every union expenditure outside of the political and ideological area chargeable to dissenting employees. The Ninth Circuit's finding that expenditures for Grand Lodge conventions,

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[1] "BRAC" refers to all respondents.

[2] "(Opp. at ____)" refers to respondents' brief in opposition.

[3] "(App. at ____)" refers to the appendices to the petition for writ of certiorari.

litigation, publications, social activities, death benefits, and organizing efforts are chargeable to dissenting employees is entirely premised upon its promulgation of an unwarrantedly expansive definition of collective bargaining activities.

Petitioners maintain that the Ninth Circuit majority opinion has misconstrued this Court's holdings in *Hanson, Street, Allen,* and *Abood.* These decisions hold that only expenditures for contract negotiation, contract administration, and grievance adjustment are chargeable to dissenters. However, those principles are stated abstractly, as in each case the factual record was deemed inadequate. This Court's application of the rule of chargeability in these cases, where there is a fully developed factual record of the range of union activities, will necessarily address the paragraph 22 expenditures at issue.

II

THE NINTH CIRCUIT APPROVED BRAC'S REBATE SCHEME AS A PROSPECTIVE REMEDY

The Ninth Circuit's endorsement of a rebate procedure as an adequate remedy to protect the constitutional rights of dissenting employees was not, as BRAC contends, limited to retroactive relief. The rebate program adopted by BRAC, by its terms, applies prospectively. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 685 F.2d at 1069 (App. at 5a). The BRAC rebate procedure was adopted in October, 1975 and applied only to political and ideological expenditures, which BRAC admits are non-chargeable. The rebate procedure was applied prospectively for 1976 and 1977 expenditures after the district court's January 21, 1976 summary judgment ruling. (App. at 30a-31a). The district court imposed a dues reduction procedure upon BRAC in its 1980 order and judgment (App. at 31a, 34a), but the district court's final judgment was stayed pending BRAC's appeal.

The Ninth Circuit's majority decision endorsed the rebate scheme as a prospective remedy. It read *Street* as endorsing a rebate procedure as one of two possible remedies. 685 F.2d at 1069 (App. at 6a). The majority also erroneously found that this Court had approved a rebate procedure in *Abood.* 685 F.2d at 1070 (App. at 6a). In *Abood,* the internal union procedure did not provide for a dues reduction. 431 U.S. at

1040 n. 41. The Ninth Circuit's decision nowhere discusses the dues reduction remedy imposed by the district court upon BRAC.

In addition to the conflict with this Court's decisions, there are conflicts between the Ninth Circuit's decision in *Ellis* and the decisions in *School Comm. of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982), *Robinson v. New Jersey*, 547 F.Supp. 1297 (D. N.J. 1982), *Beck v. Communications Workers of America*, 1983 Daily Lab. Rep. No. 48, D-1, D-3 (D. Md. March 4, 1983) (Supp. App. at 20a),[4] and *Ball v. City of Detroit*, 85 Mich. App. 383, 269 N.W.2d 607 (1978).[5] The presence of direct conflicts between these decisions and the Ninth Circuit's *Ellis* decision makes it appropriate for this Court to grant the petition for writ of certiorari.

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[4] "(Supp. App. at ____)" refers to the appendix to petitioners' supplemental brief.

[5] The fact that the decisions in *Ball* and *Robinson* are interlocutory does not preclude a finding of conflict jurisdiction. (*See* Opp. at 7 n. 4) In *Curtis v. Loether*, 415 U.S. 189, 191 n. 2 (1974), this Court granted a petition for a writ of certiorari based upon conflict between the decision of the United States Court of Appeals for the Seventh Circuit and evenly divided reported decisions of district courts with regard to a right of trial by jury in actions under Title VIII of the Civil Rights Act of 1964. *Kelly v. Armbrust*, 351 F.Supp. 869 (D. N.D. 1972); *Caulley v. Smith*, 347 F.Supp. 114 (E.D. Va. 1972); and *Kastner v. Brackett*, 326 F.Supp. 1151 (D. Nev.1971), were all interlocutory decisions either granting or denying a demand for a jury trial. *See City of Morgantown v. Royal Insurance Co., Ltd.*, 337 U.S. 254 (1949) (denial of a demand for a jury trial is a non-appealable interlocutory order); *accord Corchran v. Birkel*, 651 F.Supp. 1219, 1221 (6th Cir.), *cert. denied*, 454 U.S. 1152 (1981). When the petition for writ of certiorari was filed, the *Beck* decision was interlocutory. At the time the opposition to the petition was filed, a final decision in *Beck* had been issued. *Beck v. Communications Workers of America, supra*, adopts the permanent injunctive relief requiring escrowing of agency fees. (Supp. App. at 20a). Lawrence J. Gold, one of the attorneys representing respondents here, is also counsel for the defendants in *Beck*. The brief in opposition failed to advise this Court of the decision in *Beck* which is ripe for the entry of final judgment.

III

THE CLEAR AND CONVINCING EVIDENCE TEST IS THE ONLY APPROPRIATE STANDARD OF PROOF

BRAC has the burden of proving that it is not charging dissenting employees more than a pro rata share of its contract negotiation, contract administration, and grievance adjustment expenditures. *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. at 122, *cited with approval in Abood v. Detroit Bd. of Education*, 431 U.S. at 239 n. 40. The heightened judicial solicitude given to the protection of first amendment freedoms at stake in disputes involving the exaction of compulsory union dues and agency fees requires the application of the clear and convincing evidence standard.[6] This reasoning was endorsed in *Beck v. Communications Workers of America*, 1983 Daily Lab. Rep. No. 48, at D-3 (Supp. App. at 16a-18a); relying upon this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Abood v. Detroit Bd. of Education*, 431 U.S. at 234.

The need for the application of the clear and convincing evidence test is illustrated by an example contained within the record in this case. Despite BRAC's protestation that its records were maintained in accordance with generally accepted accounting principles, no attempt was made by BRAC to refute the proven existence of its unlawful money-laundering scheme which illegally channeled funds of union members into the campaigns of political candidates endorsed by the AFL-CIO. CR 141 at 3-5 and Exhibits E-O thereto. That scheme was accomplished in collaboration with officials of the AFL-CIO.

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[6] The opposition mischaracterizes statements by counsel on an issue pertinent to the requisite standard of proof. By quoting only a portion of remarks made by counsel for petitioners, it is implied that counsel conceded the validity of BRAC's accounting practices. The implication is false, as demonstrated by consideration of the entirety of counsel's remarks. (*See* Opp. at 14). The telling comment omitted by respondents is the remainder of Mr. Merrill's remark: "We don't have that information." RT August 10, 1978 at 1103. The inquiry and response related to the rebate of political expenditures prior to the institution of the October 6, 1975 rebate scheme. As of the time of trial, there was no way that plaintiffs could know whether or not all of the funds pertaining to such expenditures had been rebated to plaintiffs, as (a) the lack of records of political expenditures made calculation of any such amounts a matter of guesswork, and (b) additional rebates had been made by the union prior to trial, but after the cutoff of discovery. Plaintiffs had no way of verifying the basis of such rebates.

CONCLUSION

Abundant cause exists for the grant of a writ of certiorari, by virtue of the transcendent importance of these cases and the existence of serious conflicts of principles of law. In these cases, petitioners present the Court with an appropriate record and detailed judicial decisions which will permit the resolution of issues which have plagued our judicial system for decades.

Respectfully submitted,

Michael E. Merrill

Counsel for Petitioners

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MAR 11 1983

No. 82-1150

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON BEHALF OF WILLIAM L. DICKINSON

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF WILLIAM L. DICKINSON

The Honorable William L. Dickinson, Member of Congress, respectfully moves for leave to file the annexed

brief *amicus curiae*.* In support of this motion, Congressman Dickinson states as follows:

Congressman Dickinson represents the Second Congressional District of Alabama in the United States House of Representatives. He was first elected to this office in 1964 and has held it continuously since then. Congressman Dickinson serves as the ranking minority member of the Armed Services Committee. Prior to his service in Congress he served as a judge in the Alabama courts.

As a member of Congress, Congressman Dickinson has a responsibility to protect and promote the interests of the large number of working men and women in his jurisdiction and in the United States generally. His request for leave to file the annexed brief is in furtherance of this responsibility.

Congressman Dickinson believes that the positions he takes in this brief, particularly those relating to the constitutional significance of this case to the working men and women of America, will not otherwise be fully presented to the Court.

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*Pursuant to Rule 36 of the Rules of this Court, counsel for William L. Dickinson requested the consent of counsel for the parties to the filing of a brief *amicus curiae* in this case. Counsel for Petitioners has consented to the filing of this brief, while counsel for Respondent has refused to consent to the filing of said brief, necessitating this motion. Counsel for Petitioners' and counsel for Respondents' letters have been filed with the Clerk of the Court.

Wherefore movant respectfully requests that his motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* WILLIAM L. DICKINSON

This brief *amicus curiae* on behalf of William L. Dickinson is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE *AMICUS CURIAE*

The interest of William L. Dickinson is set forth in his foregoing motion for leave to file a brief as *amicus curiae*.

REASONS FOR GRANTING THE WRIT

I. The *Ellis* Case Raises Critical Unresolved Issues Of National Importance Which Should Be Decided By This Court.

For twenty-seven years the United States Supreme Court has grappled with the distinction between permissible and impermissible uses by unions of agency fees paid by those working men and women who choose not to join unions but who are required to pay those fees under collective bargaining agreements permitted by federal law. A showing of an overriding governmental justification must be made before the state can compel an employee to give financial support to any group. This coercion impinges upon employees' First Amendment rights of free speech and association when that financial support is used to pay for union activities other than collective bargaining. It impinges most seriously on an employee's First Amendment rights when that employee's funds are used to support political candidates whom he opposes and advance an ideology with which he disagrees. Although some important steps have been taken by this Court to give recognition to these minority rights, the Ninth Circuit's decision in *Ellis* dangerously broadens the scope of the activities for which funding may be compelled. Additionally, the judicial remedies necessary to protect these constitutional rights remain underdeveloped and ineffective. A brief review of the five most important cases decided by this Court illustrates the need to establish standards and identify appropriate and effective remedies. The *Ellis* case should be the vehicle to accomplish those goals.

This series began with *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956). Nonunion railroad employees challenged the constitutionality of a 1951

amendment to the Railway Labor Act, Pub. L. No. 82-914, § 2, Eleventh, 64 Stat. 1238 (codified at 45 U.S.C. § 152, subd. 11). This amendment allowed unions and railroad companies to enter into agreements under which all employees were required, as a condition of employment, to pay certain dues to the union. Justice Douglas, writing for a unanimous Court, upheld the constitutionality of the amendment because an infringement of First Amendment rights of nonunion members was not presented by the record before the Court.

The payments were upheld on the theory that the nonmembers' ". . . financial support required relates . . . to the work of the union in the realm of collective bargaining." 351 U.S. at 235. Justice Douglas expressly acknowledged the First Amendment prohibition against using these funds for purposes other than collective bargaining. "If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." 351 U.S. at 235. Justice Douglas expressed deep sensitivity to the potential First Amendment issues which could arise, stating that ". . . if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." 351 U.S. at 238.

The precise issue forseen by Justice Douglas in *Hanson* arose five years later in another Railway Labor Act case, *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961). There, the employees alleged and the state court found that a substantial part of the compelled dues payments were used to finance the election campaigns of candidates for public office whom the employees opposed and to promote political and economic ideologies

with which the employees disagreed. This Court viewed the constitutional questions raised by the record to be ". . . of the utmost gravity." 367 U.S. at 749. Nevertheless, in order to avoid an unnecessary constitutional decision, this Court determined that the Congressional intent underlying the 1951 amendment prohibited the union from spending the dues of nonmembers for political causes which they opposed. The 1951 amendment was limited ". . . to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 U.S. at 764.

The holding limited the interpretation of the 1951 amendment to ". . . deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U.S. at 768-69. This Court expressed ". . . no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes." 367 U.S. at 769.

This Court's reason for barring the use of exacted funds for political expenditures was its implicit conviction that this would violate employees' First Amendment rights and its view that the reason for the 1951 amendment's requirement of dues payments by nonmembers was the need to defray the expenses of the ". . . negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." 367 U.S. at 768.

The state court in *Street* had enjoined the enforcement of the labor agreement because it had found a violation of constitutional rights. This Court found that remedy too broad and remanded the case for consideration of a proper

remedy. This Court suggested two possible remedies: an injunction against spending the funds of complaining employees for political causes, and the restitution of a proportional share of the dues. A prospective remedy was not otherwise addressed.

The type of remedy a court should fashion in these cases was again before this Court in another Railway Labor Act case, *Brotherhood of Ry. Clerks* v. *Allen*, 373 U.S. 113 (1963). This Court held that a protesting employee must manifest his opposition to union expenditures in order to be entitled to relief, but the burden of proof was not his. "It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union." 373 U.S. at 118 (emphasis original). Again this Court found the injunction fashioned by the state court inappropriate, and it presented certain suggestions for future decrees. The Court suggested to the state court that a refund be provided for the ". . . portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and . . . *a reduction of future such exactions from him by the same proportion.*" 373 U.S. at 122 (emphasis added). The Court also encouraged unions to adopt voluntarily a plan providing dissenters with relief. *Id.*

The next month, this Court decided *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U.S. 746 (1963) under the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* (1963). This Court recognized there is a distinction between collective bargaining and the institutional activities of a union. 373 U.S. at 752-54. It also noted that if nonmember funds are used to pay collective bargaining expenses, and member dues are used for institutional

expenses, the nonmember would pay a disproportionate share of collective bargaining costs and thereby subsidize the union's institutional activities. 373 U.S. at 754.

This matter was not before the Court in a major case again until *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977). This case was different from *Hanson*, *Street*, *Allen* and *Schermerhorn* in that it involved a public employee union. A concurring minority opinion signed by three Justices indicated that they would have ruled that public sector employment was of a different nature than private sector employment and that ". . . compelling a government employee to give financial support to a union in the public sector—regardless of the uses to which the union puts the contribution—impinges seriously upon interests in free speech and association protected by the First Amendment." 431 U.S. at 255 (Powell, J., concurring). Accordingly, these Justices would ". . . require the State to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives." 431 U.S. at 264.

This approach was not accepted by the Court, which believed that the private sector cases of *Hanson* and *Street* were applicable and that ". . . insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us." 431 U.S. at 225-26. This Court used the same standards established in the private sector to evaluate infringement of constitutional rights in the public sector. 431 U.S. at 230, 232. "The differences between public- and private-sector collective bargaining

simply do not translate into differences in First Amendment rights." 431 U.S. at 232. Accordingly, the *Abood* holding applies fully to a private sector case such as *Ellis*. *Havas* v. *Communications Workers of America*, 509 F. Supp. 144 (N.D.N.Y. 1981).

In *Abood* the state court ruled that the challenged state law sanctioned the use of nonunion members' fees for purposes other than collective bargaining, presenting constitutional issues not decided in *Hanson* or *Street*. 431 U.S. at 232. The Court held that the Constitution requires ". . . that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." 431 U.S. at 235-36.

Just as earlier Supreme Court decisions left certain issues undecided for later resolution, the *Abood* case anticipated that a case such as *Ellis*, with a fully developed record and comprehensive trial and appellate court opinions, would be presented to this Court. "There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." 431 U.S. at 236. Because the *Abood* case came to this Court after a judgment on the pleadings with no evidentiary record, without factual concreteness and adversary presentation to aid the Court, there was no occasion to delineate the distinction between permissible and impermissible uses of dissenters' fees and fashion an adequate remedy. 431 U.S. 236-37.

The *Ellis* case below arises under the Railway Labor Act and involves the determination of permissible and

impermissible uses of compelled funds. The Ninth Circuit cited a leading labor law casebook description of the issue as " '. . .the elusive problem left unresolved by the Supreme Court. . . .' " 685 F.2d at 1072. The Ninth Circuit relies on isolated, out of context, excerpts from this Court's holdings in *Hanson*, *Allen* and *Abood* to conclude that the relevant inquiry is ". . .whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Id.* The Ninth Circuit proceeded to apply this novel test broadly, interpreting "germane," first used in this context in *Allen*, 373 U.S. at 122, to mean, simply, related.[1]

Judge Whelan's strong dissent points out the way in which the majority misinterpreted the word germane and ignored the distinction recognized in *Schermerhorn*. 685 F.2d at 1076 (Whelan, J., dissenting). A review of the five Supreme Court cases discussed *supra* leads to the inescapable conclusion that the range of expenses which can be funded with compulsory funds extends no further than the very rationale which allows the state to impose this restriction on First Amendment rights—the elimination of "free riders" through the compelled payment of expenses ". . . for the purposes of collective bargaining, contract administration, and grievance adjustment. . . ." *Abood*, 431 U.S. at 225-26. The Ninth Circuit disregarded the necessity of seeking the least restrictive intrusion into protected First Amendment interests of the individual employees. The reason for allowing an intrusion into protected First Amendment areas by compelling these

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[1] One commentator pointed out that "[a]lmost any expenditure made by a union is connected in some way to its duties as collective bargaining representative." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196 (1977).

payments is to meet those responsibilities conferred by the Railway Labor Act. In the area of non-collective bargaining institutional expenses, the reason for the intrusion is not applicable. As the reason for the rule fails, so should the rule. These expenditures certainly cannot be justified when weighed against the First Amendment interests of nonmembers.

The Ninth Circuit majority's excessive tolerance of intrusions into First Amendment rights would be remedied and prevented on a nationwide basis by a decision of this Court in *Ellis*. If this Court establishes clear rules of law, this will allow lower courts to consistently apply those rules and thereby safeguard First Amendment rights of nonunion members. If this Court denies *certiorari* in this case, the result will be continued judicial confusion such as that already apparent in the conflict between, on the one hand, the cavalier approach of the *Ellis* majority and, on the other, the more scrupulous concern for dissenters' rights shown by other courts in, for example, *Galda* v. *Bloustein*, 686 F.2d 159, 163-64 (3rd Cir. 1982); *Robinson* v. *New Jersey*, 547 F. Supp. 1297, 1316-17 (D.N.J. 1982); *School Committee* v. *Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982); *Falk* v. *State Bar*, 411 Mich. 63, 105-12, 305 N.W.2d 201, 212-16 (1981) (opinion of Ryan, J.).

The *Ellis* case is a remarkable opportunity to draw the line between permissible and impermissible uses of agency fees. This case meets all of the standards set out in *Abood*, as it comes to this Court with a full evidentiary record. The factual issues were established after a trial to determine the nature of union expenditures. Able and effective counsel assisted the trial and appellate court in shaping the record. These circumstances present themselves together in one case in this area of the law only rarely.

The *Ellis* case commenced nearly ten years ago, well before the *Abood* decision, but the issues of that case were well anticipated. This Court in *Abood* viewed the constitutional issues as extremely serious based on the same constitutional principles which prohibit a state from compelling any individual to affirm his belief in God or to associate with a political party in order to retain public employment. 431 U.S. at 235. The *Ellis* case is the first opportunity which has come before this Court to attempt to finish the work begun twenty-seven years ago in guaranteeing that no working man or woman be coerced to relinquish his or her freedom of belief, be compelled to associate in violation of deeply held personal principles, or be stripped of his or her precious First Amendment rights.

The Ninth Circuit pursued an illogical path resulting in virtually all expenditures being funded with compulsory payments. That court read *Hanson*, *Allen*, and *Abood* as supporting a ". . .broader definition of the collective bargaining concept. . ." than that urged by the protesting employees. 685 F.2d at 1072. Every type of union operating expense under challenge had been found to be unrelated to collective bargaining by the trial court, but in all cases the Ninth Circuit reversed the finding below and found that the expenditures could be made with funds exacted from nonmembers. The court's logic was that the expenditures were germane to the administration of the union; the administrative structure of the union supported, *inter alia*, the union's collective bargaining responsibilities; and therefore the expenditures were germane to collective bargaining. This approach is inconsistent with the least restrictive alternative test which the court must employ when core First Amendment protections are invaded. *Elrod* v. *Burns*, 427 U.S. 347, 362 (1967); *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

The approach of the *Ellis* dissent, however, is consistent with First Amendment standards. 685 F.2d at 1076. (Whelan, J., dissenting). To limit the use of nonmember fees to those activities *essential* to the union's role as collective bargaining representative would ". . . infringe the rights of employees to the slightest extent possible, and force dissenters to contribute only to those activities that directly benefit them—the provisions of a particular contract." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 198 (1977).

The issues raised by *Ellis* are of profound constitutional significance. Thomas Jefferson drafted the stricture: ". . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[2] It may be that "[s]ome forced associations are inevitable in an industrial society." *Street*, 367 U.S. at 775 (Douglas, J., concurring). The United States Congress has made certain accomodations to this reality in federal labor law, but has not sought to weaken First Amendment protections. The Congress enacted this one exception to a "firm legislative policy against compulsion" in the areas of railway unionization "as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act." *Street*,

---

[2] An Act for Establishing Religious Freedom passed in the Assembly of Virginia in 1786. Cited in *Abood*, 431 U.S. at 234 n. 31. Justice Black reminded us "[i]t should not be forgotten that many men have left their native lands, languished in prison, and even lost their lives, rather than give support to ideas they were conscientiously against." *Street*, 367 U.S. at 796 (Black, J., dissenting).

367 U.S. at 750-51. Justice Douglas expanded on the constitutional significance.

> Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth and Fifth Amendments be lost and we all succumb to regimentation. . . . If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief or expression. . . . [H]e should not be required to finance the promotion of causes with which he disagrees. [367 U.S. at 776 (Douglas, J., concurring).]

The exception to this Congressional policy against compulsion, the intrusion into protected First Amendment rights, must be viewed narrowly lest the exception engulf the rule.

II. The Ninth Circuit's Rebate Scheme Is Inadequate To Remedy A Serious Violation Of Constitutional Rights.

The Ninth Circuit undertook only a cursory inquiry into the propriety of the union's rebate scheme challenged below. The nonmembers alleged that the rebate program did not guarantee their First Amendment rights. The Ninth Circuit found this claim meritless. *Ellis*, 685 F.2d at 1069-71.

The rebate scheme approved by the Ninth Circuit is wholly inadequate to protect the rights of working men and women to be free from compulsory support of union activities other than collective bargaining. Under this scheme a worker is required to pay the full amount of annual dues, whether or not he disagrees with the political, ideological and other activities of the union other than collective bargaining. The union is free to expend the worker's funds on its political and ideological activities or other programs other than collective bargaining in its discretion. If a worker formally notifies the union of his objection to its political and ideological activities, it is

obligated to rebate to him during the succeeding year a portion of his dues equivalent to the amount the union spends on political and ideological activities in proportion to its total expenditures in the year in which the dues are paid. The union unilaterally decides what proportion of its activities are political and ideological. Workers who are dissatisfied with the amount of the rebate may challenge the determination before a review board whose members are selected by the union.

The dissenting workers are thus still required to support, until their dues are returned to them, views with which they disagree. During this period their First Amendment rights are violated just as surely as were the rights of the workers in *Abood*.

The right to free speech includes the right not to speak at all. *Wooley* v. *Maynard*, 430 U.S. at 714. The right to freedom of association and belief must therefore include the right to avoid associations that compel support of beliefs and ideals with which one disagrees.

A limitation on the exercise of freedom of speech is a prior restraint requiring ". . . the most exacting scrutiny . . ." by this Court. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). The compulsion inherent in the rebate scheme should be judged against no less strict a standard of review.

The eventual return of their dues does not undo the violation of the workers' rights. At best, it merely changes the character of their compulsory support of the union from an outright grant to an interest-free loan. As Justice Black concluded, to give a right to a rebate such as that set out in *Street* ". . . promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated."

397 U.S. at 796. Once damaged these rights are irreparably harmed. *Robinson* v. *New Jersey*, 547 F. Supp. at 1317-24; *School Committee* v. *Greenfield Education Association*, 385 Mass. at 78-85, 431 N.E.2d at 185-89; *see*, *Abood*, 431 U.S. at 244 (Stevens, J., concurring); *Galda* v. *Bloustein*, 686 F.2d at 167-69.

This Court has enunciated the principle many times that when the state seeks to limit rights under the First Amendment it must select the means which are least restrictive. The law should strive to protect these rights to the greatest extent possible and should not be parsimonious in the protective measures it adopts. *Street*, 397 U.S. at 797 (Black, J., dissenting). The Ninth Circuit has failed to adhere to this fundamental constitutional principle. There are alternatives to the rebate scheme used in this case which are much less intrusive into the rights of the workers to be free from compulsory support of union political and ideological activity. Reduction of dues prior to payment is a fairer means of protecting workers' rights. *Allen*, 373 U.S. at 122. This remedy does not require one who is constitutionally wronged to take the initiative to recoup his rights at the discretion of an organization that had deprived him of those rights. The Ninth Circuit's suggested cure is too tolerant of this constitutional deprivation.

There is no compelling interest on the part of the state or union which justifies the violation of workers' rights sanctioned by the rebate scheme. The state's interest in this area is no broader than reimbursement of the union for its services as the collective bargaining agent and likewise the union's only interest is support of its collective bargaining activities. Neither has a legitimate interest which would justify the collection of excessive agency fees, subject only to later rebate. Such a scheme

therefore impermissibly sacrifices the fundamental First Amendment rights of workers without an overriding governmental purpose.

CONCLUSION

The First Amendment rights which have been deemed so important by this Court were dealt with in cursory fashion by the Ninth Circuit. If this Court's holdings are not to be recast so as to weaken the protection they afford minority employees, this Court should grant *certiorari* to the Ninth Circuit and use the *Ellis* case to establish national criteria for the permissible uses of agency fees, as anticipated by *Abood*, which will protect fully the vital First Amendment rights of American working men and women.

Respectfully submitted,

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the United States Constitution and the Railway Labor Act permit a labor ogranization to collect and spend compulsory union dues and agency fees, over the objection of employees, for purposes other than the negotiation and adminstration of a collective bargaining agreement between that labor organization and the employer of those employees and the adjustment of grievances under that collective bargaining agreement?

2. Whether a labor organization, which owes a fiduciary obligation to dissenting employees not to misspend their compulsory dues and fees for impermissible purposes, must show by clear and convincing evidence from records maintained in accordance with generally accepted accounting principles the amounts spent from those dues and fees for contract negotiation and administration and grievance adjustment?

3. Where a labor organization collects and spends compulsory union dues and agency fees of employees for purposes other than the negotiation and administration of a collective bargaining agreement and the adjustment of grievances between that labor organization and the employer of those employees, does a scheme which allows for the collection, expenditure, and subsequent union-determined rebate of a portion of dissenting employees' dues or fees used for purposes other than contract negotiation, contract administration and grievance adjustment satisfy the requirements of the Railway Labor Act and the first amendment to the Constitution of the United States?

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OPINIONS BELOW

The opinion of the court of appeals (App. Cert. 1a-16a),[1] is reported at 685 F.2d 1065 (9th Cir. 1982). The findings of fact and conclusions of law of the United States District Court for the Southern District of California granting petitioners' motion for summary judgment as to liability is reported at 78 Lab. Cas. ¶ 11,290 (S.D. Cal. 1976) (J.A.III 231-40). The district court's summary judgment order was later amended. The order amending the summary judgment is reported at 79 Lab. Cas. ¶ 11,765 (S.D. Cal. 1976) (J.A.III 244-45).

A trial on the damages issue was held in August, 1978. The additional findings of fact and conclusions of law are reported at 88 Lab. Cas. ¶ 11,986 (S.D. Cal. 1980) (J.A.IV 365-69). The final judgment was entered on July 9, 1980, and is neither officially nor unofficially reported (J.A.IV 370-96).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on September 3, 1982 (App. Cert. 1a). The petition for a writ of certiorari was timely filed on January 7, 1983, and was granted on April 18, 1983. Jurisdiction of this court is conferred under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are those of Section 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976), of the Railway Labor Act, as amended. The pertinent provisions of the Constitution of the United States are U.S. Const. amend. I and U.S. Const. amend. V (App. Cert. 36a).

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[1] "J.A." refers to portions of the Joint Appendix. Each reference will be followed by volume number and the page of the Joint Appendix at which it appears. "App. Cert." refers to portions of the Appendices to Petition for Writ of Certiorari separately presented pursuant to Sup. Ct. R. 21.1(k). "Supp. App." refers to portions of the Appendix to the Supplemental Brief to Petition for Writ of Certiorari filed pursuant to Sup. Ct. R. 22.6. "CR" refers to the docket control numer in the trial court clerk's record. All references will be to entries in the *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, infra*, civil docket sheet. "RT at __" refers to the trial court reporter's transcript, with the date of the transcript preceding each reference. "Pl. Ex." refers to trial exhibits introduced by the plaintiffs. "Def. Ex." refers to trial exhibits introduced by the defendants.

STATEMENT OF THE CASE

The Brotherhood of Railway, Airline and Steamship Clerks ("BRAC") is no stranger to union spending challenges. BRAC was a principal defendant in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and the lead defendant in *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963).[2]

BRAC is an international union representing employees in the United States and Canada for collective bargaining over wages, hours and working conditions (J.A.III 232, 257). As of December 31, 1977, BRAC and its subordinate bodies comprised a total membership of 202,582, of whom 19,915 were in Canada. Of BRAC's 202,582 members, 143,154 were active members. Of the total union membership, the air transportation industry accounts for a mere 5% and the railroad industry accounts for approximately 85% (J.A.III 257).

Plaintiffs in these cases are present or former employees of Western Airlines, Inc., a corporation engaged in the transportation of passengers and freight in interstate commerce. (J.A.III 232-33). Until decertified by the National Mediation Board, BRAC was the exclusive bargaining representative of the clerical employees of Western Airlines, including plaintiffs (J.A.III 232, 257).[3]

In 1971, the collective bargaining agreement required employees hired after October 27, 1966 to become and remain formal members of BRAC as a condition of continued employment. Employees hired by Western Airlines prior to October 27, 1966 and who had refused to join BRAC were not required to become formal members. In 1975, after plaintiffs attacked the formal membership requirement in their motion for summary judgment (CR 121, Memorandum of Points and Authorities in Support of

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[2] *Street* was filed on June 5, 1953, and final judgment was not entered until December 29, 1964, *sub nom. Looper v. Georgia S. & F. Ry.*, No. 16,537 (Ga. Super. Ct. Dec. 29, 1964). BRAC was one of the eight defendant unions party to the stipulation incorporated as part of the final judgment. *Allen* was filed on June 8, 1953, three days subsequent to the filing of *Street*. *Allen v. Southern Ry.*, 249 N.C. 491, 107 S.E.2d 125 (1959). BRAC was one of the two defendant unions against whom final judgment was originally entered by the trial court, *Allen v. Southern Ry.*, 42 L.L.R.M. 2175 (N.C. Super. Ct. 1958), and who appealed that judgment to this Court.

[3] Certification of National Mediation Board, Washington, D.C. in Case No. R-4995, 7 N.M.B. No. 218, July 30, 1980.

Summary Judgment at 4-9), BRAC International President Dennis unilaterally construed its constitution as not requiring union membership (J.A.III 233). Non-members remained obligated to pay fees equal to regular monthly dues and initiation fees charged by BRAC to its members (J.A.III 233, 257-58).

In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, No. 73-113-N (S. D. Cal. Filed Mar. 20, 1973) (J.A.I 5-22), the plaintiffs are present or former employees of Western Airlines who were not members of BRAC (J.A.III 233). *Fails v. Brotherhood of Railway, Airline, and Steamship Clerks*, No. 73-118-N (S. D. Cal. Filed Mar. 23, 1973) (J.A.I 78-96), is a class action (J.A.III 233). Its plaintiffs and class members (all of whom are referred to as "plaintiffs") are all members of BRAC who were or are employed by Western Airlines (*Id.*). Each plaintiff sent BRAC a written objection to the use of dues and fees exacted pursuant to the collective bargaining agreement for political, ideological, and non-collective bargaining purposes. None of these letters received a response; many were left unopened (J.A.III 234-35). These cases were consolidated in February, 1974 (J.A.II 171-74).

BRAC's organizational structure is multi-tiered. The Grand Lodge is the umbrella administrative body for all BRAC activities within the United States and Canada. (CR 30, Ex. A at 18; Def. Ex. A at 19-20, admitted Aug. 1, 1978 RT at 6-8). System Board of Adjustment No. 451 is the intermediate administrative body and the primary collective bargaining entity with Western Airlines (J.A.III 232).

Skyliner Lodge Local 3001, Skyharbor Lodge Local 3014, and Arrowliner Lodge Local 3049 are subordinate administrative and collective bargaining entities to System Board No. 451 (*Id.*).[4] At the Grand Lodge, system board and local lodge levels, independent administrative facilities and books and records are maintained (J.A.IV 367-68; Aug. 10, 1978 RT at 1086-88). The California State Legislative Committee was an unincorporated association, subsidiary to and affiliated with BRAC, which had as its purpose, in part, the sponsorship of legislation in California (J.A.III 232).

Between 1971 and 1978, plaintiffs' obligations to BRAC ranged from $11.00 to $17.00 a month. A portion of each month's fees was distributed to the Grand Lodge, the system board and a local lodge. Each local lodge

[4] Hereafter, references to "BRAC" include the Grand Lodge, System Board No. 451 and the local lodges.

sent $.30 per employee a month to the California State Legislative Committee until it was disbanded[5] and thereafter $.30 per employee per month was sent to the Grand Lodge for the support of regional political action committees. (J.A.III 257-58).

Non-Western Airlines employees represented by BRAC in both the United States and Canada have paid less in dues than that charged to plaintiffs; some pay nothing (J.A.III 258, 259-60).

At all pertinent times, BRAC has expended fees collected from plaintiffs for the political, ideological and non-collective bargaining activities enumerated in paragraph 22 of the district court's interlocutory summary judgment of January 21, 1976 (J.A.III 236-37; IV 366-68). The district court held that BRAC's use of plaintiffs' fees for these activities breached BRAC's duty to fairly represent plaintiffs and violated the Railway Labor Act (J.A.III 238-39). Although plaintiffs alleged that BRAC's conduct violated their constitutional rights under the first, fifth, and ninth amendments (J.A.I 12, 86), the trial court did not adjudicate those claims.

A trial on damages was held in August, 1978. In its findings of fact and conclusions of law and final judgment after trial, the court accepted BRAC's allocations of Grand Lodge, System Board 451 and local lodge expenditures (J.A.IV 367-68). The Court found that the maximum amount returnable to any plaintiff after five years of litigation was $352.69 (J.A.IV 373-96).

In BRAC's 1971 constitution, the Grand Lodge monthly legislative fund exaction was $.10 (CR 30, Ex. A at 49-50). Thirty cents a month from dues and fees collected at the local lodge level was paid to the California Legislative Committee (J.A.III 257). A protesting member could obtain dues reduction of $.03-1/3 per month (J.A.III 235). Refunds were refused to plaintiffs (*Id.*). The district court found that this scheme violated BRAC's duty to fairly represent all employees within the Western Airlines bargaining unit. An additional violation was found in its manner of operations (J.A.III 239).

BRAC issued a new rebate scheme through its Policy Statement of 1974 (J.A.III 235). Under that plan, rebates were calculated by the Grand

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[5] The California State Legislative Committee was apparently disbanded in 1975 (*See* Aug. 10, 1978 RT at 1085).

Lodge Board of Trustee, but the scope of refundable expenditures was confined narrowly to include only political expenditures "not germane to collective bargaining" (J.A.I 63-67; CR 30, Affidavit of C. L. Dennis, Ex. B).

In computing rebates, the Board of Trustees reviewed financial statements which could not serve as a basis for calculating BRAC political costs, as BRAC did not record expenditures or activities in that classification. (CR 104, Deposition of Wende at 43-44, 47-48; CR 104, Deposition of Sullivan at 55, 57, 101, 111). Rebates computed under the Policy Statement did not include expenditures from the Grand Lodge Legislative Fund. (CR 104, Deposition of Schraeder at 317). The amount of the rebates computed under the Policy Statement amounted to $.07 per person a month (CR 69, Ex. A at 5).

In January, 1975, the court invalidated this rebate scheme because the "standard for refunds of dues and fees contained within the Policy Statement is erroneous as a matter of law. . . ." (CR 86, J.A.III 260). Nonetheless, five months later the Policy Statement was elevated *verbatim* to the level of a BRAC constitutional amendment (J.A.III 260; CR 155, Ex. S at 451-52).

After plaintiffs filed their motion for summary judgment on August 26, 1975, BRAC scrapped the Policy Statement and adopted the current "political" rebate scheme (J.A.IV 366-67; J.A.-Exhibits 421-24, 425-26, admitted Aug. 1, 1978 RT at 6-8).

The scope of this rebate scheme is limited. It includes only expenditures for elections, legislative lobbying, dues or contributions to other labor organizations and educational groups. It does not include all of the non-collective bargaining and ideological expenditures enumerated in paragraph 22 of the summary judgment (J.A.IV 366). Rebates are computed annually by the Board of Trustees, none of whom is an accountant (CR 67 at 214-15; CR 104, Deposition of Schraeder at 43-44). The records from which the rebates have been computed are not maintained in accordance with generally accepted accounting principles. Although a dissatisfied employee may appeal to a board of review, no member of that board is an accountant. The board is comprised of an ex-politician, a law school dean, and a minister (J.A.IV 366; Def. Ex. CD(1)-(3), admitted Aug. 1, 1978 RT at 6-8). Plaintiffs have no discovery rights before the board of review. The board's function is limited to reviewing the computations made by the Board of Trustees.

SUMMARY ARGUMENT

The existence, operation, and spread of trade unionism is dependent upon the unfettered exercise of first amendment freedoms. Powerful associational ties and commitments are involved in the furtherance of BRAC's goals. Unions are private organizations, and forced financial support for their activities raises the traditional barriers which safeguard first amendment rights. Although Congress authorized compulsory financial support for BRAC, the reach of that compulsion must be measured by the strict scrutiny applied to legislative measures which curb individual freedom in order to accomplish a compelling governmental interest. Issues in this case must be decided in accordance with those strict constitutional standards.

Railway unions such as BRAC were deemed to owe a statutory duty of fair representation to non-members to bargain in their behalf with their employer and to process their grievances. As these responsibilities entailed union expense, Congress was persuaded to allow union shop provisions which require all employees represented by a union to bear a portion of the costs of performing collective bargaining functions. The extent to which payment may be extracted from plaintiffs is measured by the scope of services BRAC is required by the statute to perform. Respect for plaintiffs' first amendment rights precludes charging them for union activities on a broader scale.

Paragraph 22 of the summary judgment found that certain BRAC activities are not chargeable to plaintiffs, as they are not collective bargaining activities. Included among these are a death benefit program, conventions, publications, litigation, social activities and organizing. These BRAC activities are imbued with parochial ideological involvement and political activism. Such activities are not necessary to the proper performance by BRAC of its collective bargaining responsibilities with Western Airlines. Forced financial support by plaintiffs of these activities serves no compelling governmental purpose. Foisting such costs upon plaintiffs derogates their first amendment rights.

BRAC's accounting records were never set up or modified to isolate costs of collective bargaining with Western Airlines. First amendment strictures preclude charging plaintiffs for other union activities. Because of the jeopardy to plaintiffs' rights flowing from union collection and expenditure of their compulsory fees for a variety of institutional, political and ideological programs, BRAC should have been required to establish

the amounts of its chargeable expenditures by clear and convincing evidence. In keeping with that standard of proof, the union's accounting must be done in accordance with generally accepted accounting principles. This requirement is essential for the protection of plaintiffs' first amendment rights, as well as the enforcement of BRAC's admitted fiduciary duty not to misspend wages it has extracted from plaintiffs.

Since the rendition of plaintiffs' spending protests, which were ignored by BRAC, the union has implemented a succession of internally controlled schemes to rebate a portion of its political expenditures. It has continued to collect full fees from plaintiffs, and BRAC itself determines the amount to be rebated. Plaintiffs' constitutional rights to be free from compulsory support of union political and ideological programs are irreparably violated by these forced loans. A union-administered rebate program cannot redress the injuries to plaintiffs' constitutional rights.

ARGUMENT

I.

RAILWAY LABOR ACT AUTHORIZATION OF COMPULSORY UNION FEES MUST BE VIEWED WITH STRICT SCRUTINY AS USE OF THOSE FEES INFRINGES UPON FIRST AMENDMENT RIGHTS.

In 1951, Congress amended the Railway Labor Act, 45 U.S.C. § 151 et seq. (1976), to add Section 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976), at the behest of labor unions. *Street*, 367 U.S. at 750-64. BRAC was among the forceful advocates for the passage of Section 2, Eleventh, through its then president, George M. Harrison, who also served as spokesman for the Railway Labor Executives' Association. *Id.* at 761-63 & nn. 13-14.

Section 2, Eleventh, authorizes agreements between employers and labor unions requiring that all employees represented by a union become a member of the union within a stated period, provided there is no discrimination against the employee and provided that membership is not denied or terminated "for any reason other than failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." This type of provision is commonly referred to as

a "union shop." By its terms, Section 2, Eleventh, nullifies state laws which prohibit the union shop.

This Court has thrice found the presence of sufficient governmental action under the Railway Labor Act to impose constitutional constraints upon forced fee obligations. *Railway Employes' Department v. Hanson*, 351 U.S. 225, 231 (1956); *Street*, 367 U.S. at 749-50; *Abood v. Detroit Board of Education*, 431 U.S. 209, 218-19 & n. 12, 226 & n. 23 (1977).

This Court held in *Street* as a matter of statutory construction, and in *Abood* as a constitutional principle, that protesting employees cannot be compelled to support a union's political and ideological activities. *Street*, 367 U.S. at 768-69; *Abood*, 431 U.S. at 235-36; *see Allen*, 373 U.S. at 118. Although *Abood* arose in the context of public-sector collective bargaining, the Court expressly held that any "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." 431 U.S. at 232. This Court also noted that its previous construction of Section 2, Eleventh, in *Street* was "not without its difficulties" and was undertaken "precisely to avoid the constitutional issues" raised. *Id.* The Court thus has recognized that first amendment principles must confine the reach of Section 2, Eleventh.

Rights guaranteed by the first amendment are of transcendent value and essential to the workings of a free society. *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *Speiser v. Randall*, 357 U.S. 513, 521, 526 (1958); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). While the freedom of association is not explicitly referred to in the first amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. It is unquestioned that the first amendment protects the rights of individuals to associate to further their personal beliefs. *Abood*, 431 U.S. at 233; *Elrod v. Burns*, 427 U.S. 347, 355-57 (1976) (plurality opinion); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Healy v. James*, 408 U.S. 169, 181 (1972); *Shelton v. Tucker*, 364 U.S. at 485-86; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

The first amendment also confers full protection upon expression about governmental affairs and philosophical, social, artistic, economic, literary, or ethical matters, among others. *Abood*, 431 U.S. at 231 & n. 28. Speech does not lose its first amendment protection because money is spent to project it. As stated in *Buckley v. Valeo*, 424 U.S. 1, 22 (1976): "Making a contribution, like joining a political party, serves to affiliate a

person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Accord Abood*, 431 U.S. at 234; *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

In the labor relations context, the first amendment protects the right to discuss and inform others concerning the advantages and disadvantages of labor unions, *Thomas v. Collins*, 323 U.S. at 532, the right to discuss the merits or demerits of a labor dispute, *Virginia State Board of Pharmacy*, 425 U.S. at 762-63 (and cases cited therein), and the right of employees to voice their views individually or collectively to their employer, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 313 (1979).

The reciprocal rights not to engage in expressive activities and not to associate with others in the espousal of political, philosophical, social, artistic, economic, literary, or ethical beliefs stand with equal dignity beside the right to speak and to associate. *Abood*, 431 U.S. at 234-35; *Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Compelling employees to pay money to a labor organization "has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222. Whether labor unions benefit or detriment employees is a question over which reasonable minds may differ; and employees may have strong philosophical, ideological, or religious objections to joining unions or to contributing money to them.[6] Employees may also hold sincere objections to the positions taken by a union as their bargaining representative on a variety of issues, including compulsory union membership and financial support, the right to strike, and medical benefits. *Id.* at 222. 225 n. 20.

Under the Railway Labor Act, the representative chosen by a majority of the employes in a craft or class becomes the exclusive representative of all employees in that craft or class. A dissenting employee is forced to abide by the economic ideology that collectivization is the only path to improvements in wages, hours and working conditions. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967). The Railway

[6] The Seventh Day Adventist Church is a notable example of a religious body which forbids membership in or financial support for labor unions. *See Gray v. Gulf, Mobile & O. R.R. Co.*, 429 F.2d 1064, 1066 n.4 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

Labor Act thus clothes the union "with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates. . . ." *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 198, 202 (1944).

Because all compulsory unionism agreements resulting from governmental action have an impact on first amendment rights, the constitutional limitations applicable to those agreements also are to be found in first amendment principles. *See Abood*, 431 U.S. at 233-35. When governmental action impinges upon the full exercise of the freedoms of speech and association, only the presence of a governmental interest sufficiently compelling to survive strict scrutiny will uphold that action. The mere showing of a legitimate governmental interest is not sufficient. At all times, the party seeking to infringe upon those freedoms must assume the burden of demonstrating the presence of the compelling governmental interest, and of showing that the means selected are not susceptible to a less drastic way of satisfying that interest. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786-87 (1978); *Abood*, 431 U.S. at 259-60, 262 (Powell, J., concurring in the judgment); *Wooley v. Maynard*, 430 U.S. 716-17; *Elrod v. Burns*, 427 U.S. at 362-63 (plurality opinion); *Kusper v. Pontikes*, 414 U.S. at 58-59; *Shelton v. Tucker*, 364 U.S. at 488.

In *Hanson, Street,* and *Abood*, the Court determined that there is an important or compelling governmental interest justifying union and agency shop arrangements only "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Abood*, 431 U.S. at 232. The procedural posture of those cases made it inappropriate for the Court to draw the line between collective bargaining activities, which are chargeable to dissenters, and other activities which are not. Nor did the Court determine which remedies are required to prevent impermissible infringement of employee first amendment freedoms. However, in addressing these line-drawing and remedy issues, no definition of chargeable costs should be adopted and no remedy approved unless it is narrowly tailored to serve the governmental interest identified in *Hanson, Street*, and *Abood* in the manner least restrictive of employee freedom of association. *See, e.g., Havas v. CWA*, 509 F.Supp. 144, 149 (N.D. N.Y. 1981). The fundamental error committed by the Ninth Circuit in this case is that, unlike other courts which have addressed these two issues, it failed to apply the first amendment "strict scrutiny" test to either issue.

II.

FIRST AMENDMENT PRINCIPLES AND THE LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT PRECLUDE BRAC FROM CHARGING PROTESTING EMPLOYEES FOR EXPENDITURES WHICH ARE NOT DIRECTLY RELATED TO CONTRACT NEGOTIATION, CONTRACT ADMINISTRATION AND GRIEVANCE ADJUSTMENT.

Relying on *Street*, the district court held that the Railway Labor Act prohibits the use of protesting employees' compulsory dues and fees for a list of "non-collective bargaining activities" enumerated in paragraph 22 of its interlocutory summary judgment, as amended by its order entered on November 29, 1976 (J.A.III 236-37, 238-39, 244-45).[7]

BRAC's appeal to the Ninth Circuit accepted the non-chargeability of certain of its political, ideological, and non-collective bargaining paragraph 22 expenditures. The admittedly non-chargeable expenditures are described in subparagraphs (6), (7), (9), (11), and (12) (J.A.III 236-37). BRAC questioned the district court's paragraph 22 ruling only with regard to organizing, convention and publication expenditures, litigation costs, the death benefit program, and social activities.

In reversing the district court's conclusions with regard to the chargeability of the challenged expenditures, the Ninth Circuit majority applied a standard utterly foreign to cases involving governmental interference with the exercise of first amendment freedoms. The majority held that "the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1072 (9th Cir. 1982) (App. Cert. 10a). This murky standard, which asks whether "each of the challenged expenditures can be seen to promote, support or maintain the union as an effective collective bargaining agent," *id.* at 1074-75 (App. Cert. 13a-14a), can be employed to include as chargeable any expenditure which arguably supports the union as an

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[7] Hereafter, the categories of expenditures which the district court found not to be chargeable to protesting employees are referred to as "paragraph 22" expenditures.

institution.[8] At most this is a mere "rational basis" standard of review for assessing chargeability, limiting the judicial inquiry to whether any state or facts either known or reasonably assumed can support the legislative measure. *E.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955); *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-54 (1938).

The only appropriate standard for judging the chargeability of challenged expenditures is that each expenditure must be directly related to and reasonably necessary for the performance of the statutory functions of contract negotiation, contract administration and grievance adjustment (hereafter these functions are referred to collectively as "collective bargaining"). This precise rule was employed by the special master in *Beck v. CWA*, No. M-76-839, Report of Special Master at 12 (D. Md. Aug. 18, 1980) (Supp.App. 2a),[9] to cull chargeable collective bargaining expenses; and it was accepted by the district court in adopting the special master's report. *Beck v. CWA* 112 L.R.R.M. 3069, 3073 (D. Md. Mar. 4, 1983) (Supp.App. 21a);[10] *Ball v. City of Detroit*, 84 Mich. App. 383, 395, 269 N.W.2d 607, 612 (1978). The same test has been stated in dicta

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[8] The extent to which the majority's test impinges upon the first amendment rights of protesting employees is evident from the suggestion that impermissible political expenditures be limited to direct or indirect support to candidates for political office and political parties. Any other expenditures, regardless of their political nature, would be fully chargeable. 685 F.2d at 1072 n. 5 (App. Cert. 10a-11a). This standard is in direct conflict with *Street*, 367 U.S. at 744 & n.2, 768, which placed the propagation of political and economic doctrines, concepts and ideologies and the promotion of legislative programs in the impermissible category, and *Abood*, 431 U.S. at 235-36, 241, which reaffirmed that financial support of "ideological causes not germane to [a union's] duties as collective bargaining representative" may not be compelled. *Accord Ellis*, 685 F.2d at 1075-76 (Whelan, J., dissenting) (App. Cert. 15a-16a); *see Robinson v. New Jersey*, 547 F.Supp. 1297, 1316-17 (D. N.J. 1982) ("*Robinson I*"), *further proceedings*, 113 L.R.R.M. 3272 (D. N.J. June 15, 1983) ("*Robinson II*") (lobbying expenses unchargeable); *Olsen v. CWA*, 559 F.Supp. 754, 769-70 (D. N.J. 1983).

[9] The full original report of Special Master Barnes dated August 18, 1980, and Special Master Barnes' supplemental report dated September 14, 1981, have been lodged with this Court for its consideration. "*Beck - Special Master I*" refers to the original report. "*Beck - Special Master II*" refers to the supplemental report.

[10] In defining the term "collective bargaining," the special master and the district court in *Beck* accepted the common understanding of that term as limited to the actual negotiations between employer and a labor union to reach an agreement over the subjects of wages, hours, and working conditions. *See Beck - Special Master I* at 10-11, 41; *Beck - Special Master II* at 50.

by other courts discussing the holding of *Abood*. *Gavett v. Alexander*, 477 F.Supp. 1035, 1048 (D.D.C. 1979) ("expenditures essential to the collective bargaining process"); *see Kania v. Fordham*, 702 F.2d 475, 478-79 (4th Cir. 1983); *cf. Arrow v. Dow*, 544 F.Supp. 458, 463 (D.N.M. 1982) ("the Bar may exact dues to support only those duties and functions of the Bar which serve important or compelling governmental interests").

A "directly related" or "essential" standard of chargeability is fully consistent with the strict standard of judicial review afforded the infringement of first amendment rights. *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196-98 (1977). It also effectuates completely the congressional concern which led to the authorization of the union shop and is consistent with Section 2, Eleventh's legislative history as interpreted in *Street* and summarized in *Abood*.

Abood explained the governmental justification for this Court's holdings that union shop and agency shop agreements, properly limited, are constitutional. The Court first noted that "[t]he principle of exclusive representation . . . is a central element" underlying the labor relations systems established by the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1976), and the Railway Labor Act, 45 U.S.C. §§ 151-88 (1976). *Abood*, 431 U.S. at 220. Referring to its earlier decisions in *Hanson* and *Street*, the Court explained that this principle, and the duty of fair representation which stems from it, provided both the congressional rationale and the constitutional justification for the union shop requirement in the private sector:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. . . . Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all emplolyees. . . , union and nonunion," within the relevant unit. . . . A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" -- to refuse to contribute to the union while

> obtaining benefits of union representation that necessarily accrue to all employees. . . .
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> . . . An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere with an employee's freedom to associate. . . . But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Abood, 431 U.S. at 221-22 (citations omitted).

The Court then recognized that Michigan's public employment relations act was modeled on the federal labor system: "The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law," *i.e.*, the avoidance of "[t]he confusion and conflict that could arise" if employers had to bargain with more than one union, and the elimination of "the risk of 'free riders'." *Id.* at 223-24. Therefore, as "[t]he differences between public- and private-sector collective bargaining . . . do not translate into differences in First Amendment rights," the Court concluded that the Michigan statute was constitutional "insofar as the service charges are related to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232.

If the constitutional justification for the union or agency shop is to make "free riders" reimburse the union for its costs as their exclusive bargaining representative, the employees' obligation to pay must be limited by the scope of the union's statutory functions as exclusive representative. And so the Court implicitly held in *Abood*, 431 U.S. at 234, agreeing with the dissenting employees' argument "that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." The first amendment prohibits a union from using fees of dissenters to finance "the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not

germane to its duties as collective bargaining representative." *Id.* at 235.[11]

As the related doctrines of exclusivity and fair representation prompted authorization of the union shop, it follows under the "least restrictive alternative" test that BRAC can justify only a requirement that plaintiffs support the statutorily required collective bargaining activities with Western Airlines. The statutorily defined collective bargaining process is one which pertains only to a particular employer-union relationship. *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 64 (1975); *Steele*, 323 U.S. at 202-08. Internal union activities or programs which do not arise directly from the employment relationship are excluded from the duty of fair representation. *See Kolinski v. Lubbers*, 113 L.R.R.M. 2957, 2966 (D.C. Cir. June 17, 1983) (eligibility for strike benefits); *Bass v. Boilermakers, Local 582*, 630 F.2d 1058 (5th Cir. 1980); (expulsion from apprenticeship program); *United Food & Commercial Workers International Union, Local 222*, 245 N.L.R.B. 1035, 1039-40 (1979) (eligibility for strike benefits).

The specific legislative history of Section 2, Eleventh, compels the same conclusion on statutory grounds. Examining that history in detail in *Street*, the Court first noted that in adopting Section 2, Eleventh, Congress modified its "firm legislative policy against compulsion . . . only as a specific response to the recognition of the expenses and burden incurred by the unions in the administration of the complex scheme of the Railway Labor Act." *Street*, 367 U.S. at 751. The role of unions under this statutory scheme was next described by the Court as "collective bargaining as the method of settling railway disputes, . . . the status of exclusive representatives in the negotiation and administration of collective agreements, . . . representation on the statutory board to adjudicate grievances, . . . [and] the duty fairly and equitably to represent all employees of the craft or class, union and nonunion." *Id.* at 760-61.

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[11] Other passages in *Abood* are to the same effect. For example, in a footnote the Court reserved judgment as to whether the costs of social activities which the union allegedly financed were chargeable to the plaintiffs because it was "unclear to what extent such activities fall outside the union's duties as exclusive representative or involve constitutionally protected rights of association." 431 U.S. at 236 n. 33. And, the Court refused to require dissenting employees to specify the union activities which they opposed, in part because such a requirement would "place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative." *Id.* at 241.

It was the costs of these functions only which Congress contemplated employees would be compelled to support:

> The principal argument made by the unions in [urging adoption of § 2, Eleventh] was based on their role in this regulatory framework. They maintained that because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the costs to all employees who benefited. They thus advanced as their purpose the elimination of the "free riders". . . .
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> This argument was decisive with Congress. . . . The conclusion to which this history clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the cost of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.

Id. at 761-64.[12]

The *Street* majority concluded its review of the legislative history of Section 2, Eleventh, by stating:

> [I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." . . . We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money.

Id. at 767-68. In *Street* the Court specifically construed the Railway Labor Act to exclude compelled support for union political and ideological activity because "it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified." *Id.* at 768. But BRAC's

[12] *See also Street*, 367 U.S. at 764 n.15: "[T]he primary union and congressional concern was with the elimination of the 'free rider' who did not support his representative's performance of its functions under the Act."

use of plaintiffs' money for the various other non-collective bargaining purposes which are at issue in this case is equally "clearly outside the reasons" for Congress' authorization of union shops.

"[C]are must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362. The activities which are at issue in this case are not statutory functions of the union under the Railway Labor Act, but rather are BRAC's institutional or fraternal programs, activities which BRAC's voluntary members authorize it to do in their partisan interest and on their own behalf.

The distinction between collective bargaining costs and institutional expenses is implicit in *Street* and *Abood*. It was explicitly recognized by this Court in another of its decisions involving compulsory unionism, *Retail Clerks, Local 1625 v. Schermerhorn*, 373 U.S. 746, 752-54 & n.6 (1963). There the Court took judicial notice of the fact that unions use members' dues for purposes other than collective bargaining services and quoted examples of such non-collective bargaining purposes. The listed "institutional activities" included a number of the activities which in this case the district court held to be paragraph 22 expenses, *i.e.*, promotion of desirable legislation and defeat of undesirable legislation, publication of newspapers and magazines, and the financing of litigation.[13]

Significantly, the *Schermerhorn* dichotomy "between collective bargaining and institutional expenses" was noted by the Court in *Abood*, 431 U.S. at 237 n.35. In dissenting from the Ninth Circuit majority's decision in this case, Judge Whelan argued that his two colleagues erred by misreading *Abood* and ignoring *Schermerhorn*. *Ellis*, 685 F.2d at 1076 (App.Cert. 15a-16a) (Whelan, J., dissenting). Under both the first amendment strict scrutiny required by *Abood* and the legislative analysis of *Street*, this Court's decisions define the parameters of the chargeability of union expenditures with unmistakable clarity. As Judge Whelan would have held, only those expenditures which are costs of BRAC's performance of its statutory duties in representing clerical employees of Western Airlines are chargeable to dissenters. *Ellis*, 685 F.2d at 1076 (App.Cert. 15a-16a). Neither BRAC's political and ideological expenditures nor its institutional programs fall within that definition.

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[13] "Institutional" activities, as that term is used in *Schermerhorn*, are really fraternal or associational activities, which are to be distinguished from some overhead costs which are properly allocable to collective bargaining, contract administration, and grievance adjustment.

III.

EACH OF THE PARAGRAPH 22 ITEMS IS AN IDEOLOGICAL OR INSTITUTIONAL EXPENSE WHICH CANNOT BE CHARGED TO DISSENTERS.

In holding each expense on which it ruled to be fully chargeable, the Ninth Circuit majority did not identify any direct connection with the three narrow collective bargaining functions which may be charged to dissenting employees. The panel majority instead relied upon factors irrelevant to the considerations which led Congress to pass Section 2, Eleventh, and this Court to uphold the constitutionality of properly applied compulsory unionism agreements. In each case, the Ninth Circuit upheld the challenged expenditure, not because it was a cost of collective bargaining with Western Airlines, but because the expenditure in some way could be said to "strengthen" the union and thus generally make it an "effective" bargaining agent. *See Ellis*, 685 F.2d at 1073-75 (App.Cert. 10a-14a).

This amorphous test fails to meet first amendment standards, *see Beck - Special Master I* at 12, *adopted*, 112 L.R.R.M. at 3069 (Supp.App. 16a-18a), and it is contrary to the *Street* court's interpretation of the Railway Labor Act's legislative history. Presenting the unions' case for the union shop to Congress, "Mr. Harrison [BRAC's International President] expressly disclaimed that the union shop was sought in order to strengthen the bargaining power of the unions. . . . Nor was any claim seriously advanced that the union shop was necessary to hold or increase union membership." *Street*, 367 U.S. at 762-63 n. 13.

At most, the paragraph 22 items in question bear only a tangential relationship to collective bargaining. Each of these items is primarily an expense to further BRAC's efforts dedicated to the ideological cause of trade unionism. Each item is characterized accurately as an institutional activity in which BRAC voluntarily and unilaterally engages.

A. Death Benefits

BRAC's death benefit plan was created by the union constitution and is administered internally (CR 30, Ex. A at 52-55, 187-91). Employers do not participate in the administration of the plan and do not contribute to the plan on behalf of employees. The plan is funded entirely by

by voluntary dues and compelled non-member fees (*Id.* at 49-50). The death benefit program is not negotiated as part of the collective bargaining process and no reference is made to it in any Western Airlines' collective bargaining agreement.

The non-chargeability of such fraternal benefit programs has been clear since this Court's decisions in *Street* and *Allen*. In *Street*, death benefit programs were used by the majority as an example of an expenditure which did not invoke the "free rider" argument. 367 U.S. at 769-70 & n. 18. Justice Douglas noted that *Hanson*, which he authored, listed "various restrictions placed by union constitutions and by-laws on individual members" which may not be imposed or enforced by government. Some of these restrictions "required the use of portions of union funds for purposes other than collective bargaining." *Street*, 367 U.S. at 777 n. 3 (Douglas, J., concurring). The restrictions to which Justice Douglas referred were provisions "for the use of compulsory dues and assessments to finance union insurance and death benefit plans." *Hanson*, 351 U.S. at 236-37 n. 8. The *Allen* trial court found that compelled payments to support BRAC's death benefit system were not "reasonably necessary or related to collective bargaining" and could not be financed from protestors' fees. *See* 373 U.S. at 117. The *Allen* trial court's ruling was not disturbed by this Court.

BRAC concedes that its internal death benefit program bears a remote relationship to collective bargaining functions. (CR 30, Memorandum of Points and Authorities at 25). Nonetheless, the majority found that compelled financing of the death benefit plan was proper because: (1) death benefit plans "have historically played an important role in labor organizations," (2) insurance benefits are mandatory subjects of bargaining and internally provided death benefits allow BRAC to seek other concessions from employers, and (3) internal death benefit plans strengthen employees' ties to BRAC. *Ellis*, 685 F 2d at 1074 (App.Cert. 13).

That death benefit programs have historically been offered by some labor unions to their members is irrelevant to the issue of compelled support for those programs. The historical justification was advanced with regard to union political activity in *Street*. *See* 367 U.S. at 767, 800-03 (Frankfurter, J., dissenting). The Court rejected this argument because "it does not follow that § 2, Eleventh, places no restriction on the uses of

an employee's money, over his objection." *Id.* at 767.[14]

That insurance benefits are a mandatory subject of collective bargaining also is irrelevant. The BRAC program is a provision of the union-member constitution, not the union-employer labor agreement.[15] The Ninth Circuit majority also offered the supposition that BRAC, having required plaintiffs to pay directly for a self-insured program out of their own pockets, would necessarily obtain a corresponding monetary benefit from Western Airlines. This economic theory is absurd. It is unsupported by any facts of record or cited authority.

Finally, the claim that BRAC's death benefit program tends to strengthen employees ties to the union reflects the institutional bias tainting the Ninth Circuit majority's loose standards of chargeability.

B. Conventions

The Ninth Circuit majority held that every dollar BRAC spends on its conventions is chargeable. Plaintiffs do not contend that all expenses of BRAC conventions are non-chargeable. Plaintiffs do contend that they can be charged only their proportionate share of convention costs which are proven to be directly related to collective bargaining with Western Airlines. In the trial court, BRAC failed to establish the cost of convention activities chargeable to plaintiffs, which it was required to do under *Allen*, 373 U.S. at 122, *quoted with approval in Abood*, 431 U.S. at 239 n. 40; *see Beck*, 112 L.R.R.M. at 3073-74 (Supp. App. 18a) (union's failure to keep adequate records resulted in failure of proof).

The district court's finding that BRAC's conventions are not a collective bargaining activity was based on the record with regard to the Twenty-fifth Regular and Eleventh Quadrennial Convention. This convention, which also was the basis for the majority's contrary conclusion,

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[14] A similar argument fared no better when advanced to support the constitutionality of political patronage in public employment. *Elrod v. Burns*, 427 U.S. at 353-55 (plurality opinion).

[15] If the death benefit plan were truly bargainable, BRAC would not have been free to deny non-members participation in that program as it did prior to plaintiffs' motion for summary judgment. *See, e.g., Local 167, Progressive Mine Workers v. NLRB*, 422 F.2d 538 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970); *Prestige Bedding Co.*, 212 N.L.R.B. 690 (1974) ($1,000 death benefit provided in collective bargaining agreement).

cost BRAC in excess of $1,802,000 (CR 155 at 44). A copy of the proceedings of that convention is part of the record in this case (CR 155, Ex. S).

The convention minutes reveal heavy emphasis upon political, ideological, and social activities and programs. Nine major addresses were made by professional politicians such as the mayor of Washington, D.C., Senators Hartke, Schweiker, Humphrey, and Kennedy, and four Congressmen. (CR 155, Ex. S at 3-6, 36-46, 96-98, 107-14, 154-59, 194-203, 217-20, 248-52, 255-57). Addresses were made by George Meany, then president of the AFL-CIO, and Alexander Barkan, director of the AFL-CIO Committee on Political Education, which Barkan described as "the greatest political organization in the country today" (*Id.* at 268-73, 276-78). These speeches had nothing to do with collective bargaining between BRAC and Western Airlines, but were heavily laced with political and ideological advocacy. In addition, reports were received on union lobbying activities and resolutions were passed on a wide range of political and ideological issues (*Id.* at 236-43, 305-10, 341-42, 344-47).

The convention had little or nothing to do with collective bargaining with Western Airlines. Substantial convention activity was devoted to intra-union politics, disputes, and fiscal management. *See Ellis*, 685 F.2d at 1073 (App. Cert. 11a); *Rota v. BRAC*, 489 F.2d 998 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974), *further proceedings*, 64 F.R.D. 699 (1975).

The Ninth Circuit majority concluded that "[s]uch activities guide the union's approach to collective bargaining and are directly related to its effectiveness in negotiating labor agreements." *Id.* at 1073 (App.Cert. 11a). Once again, this is a particularized application of an overly vague, erroneous test. BRAC's conventions are a fraternal activity serving the institutional interests of union officers and voluntary members. BRAC holds conventions, not as a requirement of federal law, but in keeping with the union constitution (CR 30, Ex. A at 5-17; Def. Ex. A at 6-19, admitted Aug. 1, 1978 RT at 6-8).[16] Formal membership in BRAC is a

[16] The Ninth Circuit's reference to the requirement of the Labor-Management Reporting and Disclosure Act § 401(a), 29 U.S.C. § 481(a) (1976), that unions elect officers at least once every five years by *referendum or* convention, *Ellis*, 685 F.2d at 1073 n. 6 (App.Cert. 11a), is irrelevant. BRAC's voluntary decision to continue its historical practice of electing officers at conventions which consider many other matters, most of which

(Footnote 16 continued on page 22)

requirement for all delegates and alternates and is the basis for representation at the convention (CR 30, Ex. A at 5-12; Def. Ex. A at 6-13). Only that proportion of this fraternal congregation which BRAC proves is directly related in fact to representation of the Western Airlines bargaining unit is chargeable to plaintiffs. BRAC did not meet its burden of establishing Western Airlines collective bargaining costs.

C. Publications

A cursory review of the *Railway Clerk/interchange* magazine reveals that the predominant purpose of this publication is not to convey collective bargaining information, but to promulgate BRAC's political, ideological, and fraternal causes.

Virtually every issue of the BRAC magazine contains articles or reports discussing legislation and other political issues (CR 121, Affidavit of Scott Royce and Report on BRAC Legislative Activity and Exhibits thereto at 17-20 & nn. 139-68, 170-80). The publication regularly lists business and consumer products which are subject to BRAC-endorsed boycotts, an ideological commitment (CR 121, Appendix to Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 37-66).

The district court found that BRAC's publications are "[p]ublications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons." (J.A.III 236). The Ninth Circuit majority held the total cost of BRAC publications to be chargeable because those publications contained *some* articles reporting on Western Airlines' bargaining. *See* 685 F.2d at 1074 (App.Cert. 12a).

Schermerhorn, 373 U.S. at 753 n. 6, lists the use of union dues "to publish newspapers and magazines" as an institutional expense. Publication of a union newsletter or magazine is a first amendment-protected activity. Dissenters may be forced to subsidize a union publication only to the extent that it directly and necessarily fulfills the bargaining function. As BRAC failed to show the collective bargaining-related portion,

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(Footnote 16 continued from page 21)

are political, ideological, or fraternal in nature, cannot be a justification for forcing dissenting employees to subsidize the entirety of those functions.

the district court correctly held that all BRAC publication costs are non-chargeable.

D. Litigation

Litigation is a form of association and expression protected by the first amendment. *In re Primus*, 436 U.S. 412, 428 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 580 (1971); *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963). Indeed, litigation "related to labor issues will frequently constitute political activity which lies at the core of first amendment protections." *UAW v. National Right to Work Legal Defense & Education Foundation, Inc.*, 590 F.2d 1139, 1147-48 (D.C. Cir. 1978). Under the test for chargeability derived from *Abood* and *Street*, dissenting employees may not be compelled to subsidize union litigation unless that litigation has as its subject matter the negotiation, administration, or interpretation of the collective bargaining agreement covering those employees (including grievances thereunder).

This view is consistent with the *Schermerhorn* list of "noncollective bargaining purposes," which includes the use of dues "to finance litigation." 373 U.S. at 753 n. 6; *see Maryland Public Interest Research Group v. Elkins*, 565 F.2d 864, 867 (4th Cir. 1977), *cert. denied*, 435 U.S. 1008 (1978).

Thus, the trial court was correct in this case when it limited chargeable litigation expenses to those involving contract negotiation, contract administration, and grievance adjustment with Western Airlines (J.A.III 244-45).[17] The Ninth Circuit majority recognized that the litigation expenses affected by paragraph 22 "did not pertain to any specific collective bargaining agreement or grievance." *Ellis*, 685 F.2d at 1073 (App. Cert. 12a). Nonetheless, it found that such expenses are fully chargeable to plaintiffs because the litigation concerned such things as the legality of the airline industry's Mutual Aid Pact, bankruptcy proceedings (none of which involved Western Airlines), and BRAC's defense to claims that it has violated the duty of fair representation and Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000(e), *et seq.* (1976). *Id.* at 1073-74 (App. Cert. 12a). As the district court's test is correct under *Abood* and

[17] The district court was incorrect, however, in including expenses incurred in this litigation as a chargeable item (J.A.IV 368). *See infra* note 18.

Street, and as the majority found that none of the litigation at issue met that test, none of the expenses of that litigation can be charged to the plaintiffs.[18]

E. Social Activities

BRAC has virtually conceded that its contributions to other labor organizations, charities, and individuals are not chargeable to protestors. These fraternal expenses are now covered by the rebate scheme (J.A. - Exhibits 427-32; admitted Aug. 1, 1978 RT at 6-8). Yet BRAC's appeal to the Ninth Circuit challenged the district court's inclusion of the costs of analogous social activities as a non-chargeable item. BRAC seeks to charge protesting employees for banquets, retirement parties, floral tributes, and Christmas parties, even though International Secretary-Treasurer Sullivan admitted that social activities not attended by the employer could not be related to collective bargaining (CR 104, Deposition of Sullivan at 261).

Labor organizations are fraternal associations; their secondary role is that of a bargaining representative. As a fraternal organization, BRAC is free to make expenditures for social affairs and entertainment of any kind from voluntary payments. BRAC need not incur any expense for such activities in the performance of its collective bargaining functions. The use of the plaintiffs' funds to finance the fraternal conviviality of their unwanted union representative cannot reasonably be twisted to fit the mold of a collective bargaining expense. The Ninth Circuit made the assumption that BRAC's social activities "are important to union members," *Ellis*, 685 F.2d at 1074 (App. Cert. 13a), but it was error to

[18] Participation in the bankruptcy proceedings of *other* employers is not within the scope of the duties which the union owes to the plaintiffs as *their* exclusive representative. *See* pp. 11-17 *supra*. *None* of BRAC's other legal expenses at issue in this case involved the negotiation or administration of contracts, or the adjustment of grievances, with Western Airlines. A report of BRAC's legal department for court litigation handled through 1977 (Def. Ex. BU(2), admitted Aug. 1, 1978 RT at 6-8) reveals only three cases which involved Western Airlines, two of which were these consolidated cases (*Id.* at 8, 9, 13). All three cases allege that BRAC breached its fiduciary duty to fairly represent employees. *Abood* and *Street* do not support the proposition that employees who want no associational relationship with a union can be compelled to subsidize its defense of its alleged wrongdoing or the alleged wrongdoing of its officers. Such litigation advances or defends the union as an institution, not as the employees' exclusive representative. Of the remaining eighty-two cases reported, forty-seven (56%) were suits in which BRAC was charged with a breach of the duty of fair representation or a violation of employees' civil rights.

conclude that such costs therefore can be charged to those who are not voluntary union members.

F. Organizing

Next to the use of protestors' fees to support political candidates, legislation or other political or ideological causes, organizing expenses have the most blatant and direct impact upon their first amendment freedoms. Organizing is the advocacy of the fundamental ideological commitment to unionism, and the marketing of BRAC as a trade union and as a fraternal organization to others.

In an organizing campaign, employees do not speak with one voice and are not of one mind. Unions are regularly defeated in their attempts to attain and to maintain their representation of employees, as BRAC was when decertified as the representative of the clerical employees of Western Airlines. Organizing is expensive; between 1974 and 1977 defendant System Board No. 451 spent over $100,000 on organizing efforts without producing a single new member (CR 260, Affidavit of Anne Healan, Ex. A).

The controlling first amendment principles have long been settled. "[B]oth the employee and the employer are protected by the First Amendment when they express themselves on the merits of [a labor] dispute in order to influence its outcome." *Virginia State Board of Pharmacy*, 425 U.S. at 762. "The right to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. at 532.

Organizing activities are aimed at the advancement of BRAC's parochial political, social and economic philosophies. They are intended to advance the institutional interest of expanding its financial base. BRAC and its adherents have a constitutionally protected right to advocate the expansion of their organization, but plaintiffs have equivalent constitutional rights not to speak and not to associate in furtherance of that cause.

Organizing is not a function the exclusive bargaining representative is required to perform under the Railway Labor Act. It was not one of the reasons advanced by unions seeking authorization for the union shop.

In convincing Congress to enact Section 2, Eleventh, BRAC President Harrison "*expressly disclaimed* that the union shop was sought in order to strengthen the bargaining power of unions." *Street*, 367 U.S. at 762 n. 13 (emphasis added). The tenuous bargaining strength argument was the sole ground for the Ninth Circuit majority's conclusion that organizing is chargeable to dissenting employees. *See Ellis*, 685 F.2d at 1074 (App.Cert. 13a). That premise was not one of the reasons accepted by Congress in enacting Section 2, Eleventh, and it follows that organizing serves no acknowledged governmental purpose. It therefore cannot be the compelling governmental interest required to justify forced financial support for an activity so permeated with an ideological essence.

IV.

BECAUSE OF THE TRANSCENDENT VALUE OF PLAINTIFFS' FIRST AMENDMENT RIGHTS, DUE PROCESS MANDATES THAT BRAC ESTABLISH CHARGEABLE COLLECTIVE BARGAINING COSTS BY CLEAR AND CONVINCING EVIDENCE WHICH MEETS ACCOUNTING STANDARDS.

BRAC did not prove its costs of collective bargaining with Western Airlines. Instead, it identified only those expenditures which it deemed to fall into paragraph 22 categories (J.A. - Exhibits 401-20, admitted Aug. 1, 1978 RT at 6-8; Def. Ex. C, admitted Aug. 8, 1978 RT at 6-8; J.A.IV 367-68). That approach maximizes the cost burden borne by plaintiffs. Every dollar spent by BRAC was presumptively considered to be a cost of collective bargaining with Western Airlines unless it was excluded. This approach has been condemned judicially when utilized by an agency of the federal government. *National Cable Television Association, Inc. v. FCC*, 554 F.2d 1094, 1105 (D.C. Cir. 1976); *see National Cable Television Association, Inc. v. U.S.*, 415 U.S. 336, 340-44 (1974); *FPC v. New England Power Co.*, 415 U.S. 345, 349-51 (1974). It is equally invalid in the area of union spending litigation. *Beck v. CWA*, 112 L.R.R.M. at 3073 (Supp. App. 16a-18a); *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 76-77 n. 3, 431 N.E.2d 180, 185 n. 3 (1982); *Ball*, 84 Mich. App. at 395-96, 269 N.W.2d at 612-13; *see Robbinsdale Education Association v. Teachers, Local 872*, 307 Minn. 95, 107-08, 239 N.W.2d 437, 444, *vacated and remanded sub nom. Threlkeld v. Teachers, Local 872*, 429 U.S. 880 (1976), *reinstated*, 316 N.W.2d 551, 552 (Minn.), *cert. dismissed*, 103 S.Ct. 24 (1982).

The trial court and the Ninth Circuit allowed BRAC to evade its burden of proving chargeable costs. Moreover, the damages issues upon which BRAC presented proof were determined upon an inappropriate standard. Defendants were held to a preponderance standard, rather than that of clear and convincing proof. The results of using the less rigorous preponderance standard must be evaluated in the light of BRAC's grossly inadequate accounting records and its non-adherence to generally accepted accounting principles. BRAC admittedly owed plaintiffs "a fiduciary obligation not to misspend dues receipts. . . ." (CR 80 at 31; *see also* J.A.I 10, 26, 71, 84-85, 101; II 165). Obviously, the duty "not to misspend" plaintiffs' dues and fees carries with it a correlative obligation to maintain records so that the courts can ascertain whether or not the union has complied with its fiduciary obligation.

None of the defendants has maintained accounting records to isolate the costs of collective bargaining with Western Airlines, or those incurred for paragraph 22 expenses (Aug. 2, 1978 RT at 255-56; Aug. 3, 1978 RT at 390-91; Aug. 8, 1978 RT at 733-34, 803-04, Pl. Ex. 638, admitted Aug. 8, 1978 RT at 764). Records of the defendants are not maintained in accordance with generally accepted accounting principles (Def. Exs. D to BY, E to BZ, all admitted Aug. 1, 1978 RT at 6-8). At the Grand Lodge, arbitrary fund accounting segregation is used, but frequent interfund transactions obscure this ostensible segregation. Use of this accounting method has met with strong criticism:

> Fund accounting is a necessary evil born of the legal requirement to segregate and account separately for certain funds, and should never be used when such requirements are not present. It produces complex and confusing financial statements. It can be used by the unscrupulous to shift, create, and conceal income and expense in an accounting version of the old shell game.

The Law of Associations, 18-6 (G. Webster ed. 1975). The evil described is a reality here. Both the Grand Lodge and AFL-CIO's Committee on Political Education use fund accounting. They collaborated to "launder" $100,000, illegally channeling funds of union members and agency fee payors into the campaigns of political candidates endorsed by the AFL-CIO. This shell game was analyzed and documented by plaintiffs' expert Ross (J.A.II 177-92). Ross' analysis has never been refuted. There is substantial difficulty in attempting to ascertain the cost of a particular Grand Lodge program or activity, as data are obscured by its use

of fund accounting. Gross and Martin, "Cost Accounting in Nonprofit Organizations," in *Handbook of Cost Accounting*, at 25-7 (Davidson & Weil ed. 1978).

At the system board and local lodges, accounting records have been maintained on the basis of natural expense classifications (*i.e.*, rent, salaries), rather than functional classifications such as collective bargaining with Western Airlines, organizing, or political activities. As stated in the *Handbook of Cost Accounting*, "functional reporting is essential if meaningful 'cost' data are to be developed." *Id.* at 25-10.

The search for meaningful cost data was the entire point of the trial below. Defendants failed utterly to establish compliance with any recognized accounting standards; their proof consisted largely of estimates of time spent and suppositions as to the purpose of given expenditures. No expert witness validated these flimsy efforts.

Plaintiffs presented a Certified Public Accountant, Irving Ross, with a thorough grasp of the issues in the case and intimate familiarity with defendants' records. Mr. Ross spent approximately 1200 hours in reviewing documentation in these cases, union records, attending depositions, and sitting throughout the trial (Aug. 10, 1978 RT at 1079-87). He testified that it is impossible to make verifiable determinations of BRAC's expenditures in accordance with generally accepted accounting principles (*Id.* at 1089-90, 1093, 1127, 1130, 1133, 1155). Plaintiffs presented another Certified Public Accountant and professor of accounting, Arthur Brodshatzer. He agreed with Ross that not only had BRAC failed to submit accounting proof meeting a fiduciary standard, the union's proof did not rise to the level of ordinary business standards (*Id.* at 1133, 1229-30). As to the limited area of political expenditures and subsequent BRAC rebate calculations, the union offered no rebuttal to Ross' opinion that rebate calculations for years prior to the trial were unreliable (*Id.* at 1104).[19]

The trial court accepted defendants' evidence on the allocation of costs of the union's activities, notwithstanding its gaps, errors and lack of adherence to a measurable accounting standard of reliability. The only attempt at apportioning Grand Lodge legal expenses was made by

[19] Mr. Ross testified at similar length in *Beck v. CWA, supra*. Special Master Barnes found him to be unusually well qualified, objective, truthful and accurate. *Beck - Special Master I* at 15-16.

Comptroller Howard, a non-lawyer (Aug. 8, 1978 RT at 847). He allocated BRAC's in-house legal expenditures for the years *1976* and *1977* by examining the correspondence files of the BRAC legal department for *March and April, 1978*. Howard estimated the percentage of pieces of correspondence which he characterized as dealing with collective bargaining matters and allocated that entire department's costs for the full years of 1976 and 1977 based upon that estimate (*Id.* at 791-92).

Had the appropriate "clear and convincing evidence" standard been applied in *Ellis*, plaintiffs' legal right to be free from compulsory support of non-collective bargaining activities might have been observed. The trial court's damages award is in shocking contrast to that of *Beck*, where painstaking analysis of accounting methods and evidence was undertaken, and the clear and convincing standard was applied. CWA and BRAC are structurally and functionally comparable, yet fully 79% of dissenters' fees in *Beck* were found to be non-chargeable, at all organizational levels. 112 L.R.R.M. at 3073, 3075 (Supp.App. 20a, 21a-22a). In *Ellis*, judicial condonation of BRAC's slipshod accounting, coupled with the application of the meager preponderance standard of proof, provided the union with a massive windfall. The union has been allowed to retain 60% or more of plaintiffs' fees at the Grand Lodge level, and nearly 100% at other levels.

The financial injuries inflicted upon plaintiffs are vastly overshadowed by the violations of their first amendment rights. Protection of those rights is dependent upon use of the clear and convincing standard.[20] That standard is imposed to safeguard liberty interests, in keeping with their lofty value. *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Speiser v. Randall*, 357 U.S. at 526; *Beck v. CWA*, 112 L.R.R.M. at 3073 (Supp.App. 16a-18a).

Plaintiffs' interest in not being compelled to support the union's political, ideological, and institutional activities is of a constitutional dimension. An infringement on these rights, even temporarily, causes irreparable injury. *Elrod v. Burns*, 427 U.S. at 373 (plurality opinion); *Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689, 691 (7th Cir. 1975); *Olsen v. CWA*, 559 F.Supp. at 768; *Lehnert v. Ferris*

[20] BRAC's admitted fiduciary duty not to misspend plaintiffs' fees also supports the application of the clear and convincing standard of proof. A fiduciary called upon to account for property entrusted to him must establish its handling of that property by clear and convincing evidence. *Hobson v. Eaton*, 399 F.2d 781, 784 (6th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

Faculty Association, 556 F.Supp. 316, 319 (W.D. Mich. 1983). The public interest requires steadfast protection of these rights. *Robinson II*, 103 L.R.R.M. at 3277; *Olsen v. CWA*, 559 F.Supp. at 768. Society bears the risk of error where infringement of first amendment rights is at issue by assuming the heavy burden of affirmatively showing that any invasion of individual freedoms, presumed to be unlawful, is supported by a compelling governmental interest lending itself to no less restrictive alternative. *Buckley v. Valeo*, 424 U.S. at 25; *Healy v. James*, 408 U.S. at 184; *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Thomas v. Collins*, 323 U.S. at 530. As this Court mandated in *Kusper v. Pontikes*, precision of regulation where first amendment interests are affected is the touchstone. 414 U.S. at 59. Where a prior restraint is imposed, the party seeking to impose the restraint must both initiate the litigation and prove that the restraint is justified. *Abood*, 431 U.S. at 263 (Powell, J., concurring in the judgment); *Southeastern Productions, Ltd. v. Conrad*, 420 U.S. 546, 559-60 (1975); *Freedman v. Maryland*, 380 U.S. at 57-58.

The requirement that BRAC prove the amount of chargeable expenditures by clear and convincing evidence is simply a corollary to these settled principles, ensuring that these rights are effectively protected. A consequence of procedural inadequacies cannot be the surrender of first amendment rights. Congress would thereby have effected a result it could not have commanded directly, an outcome already condemned by this Court. *Speiser v. Randall*, 357 U.S. at 526.

BRAC can assert only a statutorily created right to exact monies from plaintiffs to support its collective bargaining activities. BRAC has no legitimate interest in the receipt and expenditure of plaintiffs' fees beyond the support of its collective bargaining activities with Western Airlines. *Robinson I*, 547 F.Supp. at 1320-21; *Greenfield*, 385 Mass. at 83-85, 431 N.E.2d at 189.

Unless a more exacting standard of proof is imposed, including compliance with generally accepted accounting principles, unions will continue to maintain their records in a manner thwarting the exercise of dissenters' objections. Protesting employees will relinquish their rights because of the lack of resources to analyze union records and accounting practices. Individual dissenters cannot shoulder the formidable financial burden to obtain the meager refunds recovered here. *Robinson I*, 547 F.Supp. at 1319; *cf. Freedman v. Maryland*, 380 U.S. at 59 (prior restraint to prevent exhibition of motion pictures must satisfy rigid

safeguards because exhibitor's financial stake in single picture may not warrant protracted and onerous litigation).

The facts in *Ellis* clamor for a clearly stated requirement of accounting standards. *Allen* imposed the burden of proof upon BRAC, but its discussion of accounting requirements has been misinterpreted as having condoned whatever accounting practices a union finds convenient.

BRAC was a defendant in *Street* for eleven years, and in *Allen* for eleven years. Yet thirteen years after the *Street* decision, BRAC's independent auditor and its International Secretary-Treasurer testified that neither collective bargaining costs nor expenditures for political activities could be determined. (CR 78 and CR 104, Depositions of Sullivan at 57, 176-78, 199-201, 284-88; CR 104, Deposition of Wende at 43-44, 48).

In treating all BRAC expenditures as being presumptively incurred for collective bargaining with Western Airlines, the courts below have rewarded BRAC handsomely for its contemptuous refusal to heed the rule of *Street* and *Allen*. That reward has been gift-wrapped in a burden of proof used to measure disputes in which only property interests are at stake.

V.

AN INTRA-UNION PROCEDURE WHICH ALLOWS A DISSENTERS' AGENCY FEE TO BE USED FOR IMPERMISSIBLE PURPOSES SUBJECT TO A LATER, UNION-DETERMINED REBATE IS CONSTITUTIONALLY INADEQUATE.

Since this action began, BRAC has collected full fees and has returned only a pittance to plaintiffs.[31] These rebates have been tendered pursuant to the scheme adopted by BRAC in October, 1975. The rebates are computed by BRAC, and have not been sent to plaintiffs until almost six months after the close of the year to which they pertain (J.A. - Exhibits, 438-44, 445-51, 452-53, admitted Aug. 1, 1978 RT at 6-8). Thus, for as long as a year and a half BRAC is free to use plaintiffs' full fees for

[31] For the years through 1976, the portion rebated was a mere 4.9%. For 1977, the rebate was only 5.4% (J.A.IV 366-67).

purposes which are unquestionably proscribed by the Railway Labor Act and the first amendment.

The district court found that this limited rebate procedure vindicated plaintiffs' rights in the political and ideological area (J.A.IV 366-67). By endorsing the rebate scheme as a prospective remedy, reversing the district court's paragraph 22 ruling, and instructing the district court "to enter judgment in favor of BRAC and to conduct any further proceedings necessary to comply with this opinion," *Ellis*, 685 F.2d at 1075 (App. Cert. 14a), the Ninth Circuit majority expunged the dues reduction feature of the final judgment (J.A.IV 367-68, 371).

The majority asserts that *Street* and *Allen* authorized a rebate procedure as a remedy for statutory violations, and that in *Abood* the rebate remedy was "approved to protect against constitutional violations as well." *Id.* at 1069-70 (App.Cert. 6a).

Street did not hold that any particular remedy was proper, because the Court remanded that case "to the court below for consideration of a proper remedy." 367 U.S. at 772. The Court discussed two "[a]mong possible remedies which would appear appropriate to the injury complained of." *Id.* at 774. The two "possible remedies" were an injunction against the union's expenditure of the portion of a dissenter's money allocable to unchargeable activities (in effect, a dues reduction) and restitution of that portion of the money expended improperly.[33]

The later discussion of appropriate remedies in *Allen* indicates that the Court considered restitution as part of "a practical decree" to remedy past violations, which can be remedied in no other way, avoiding future violations by ordering "a reduction of future exactions" by the proportion allocable to unchargeable activities. 373 U.S. at 122. The suggestion that unions should consider adopting "some voluntary plan by which dissenters would be afforded an internal remedy" was proferred by *Allen*

---

[33] Justices Black and Whittaker dissented from the *Street* suggestion of proportionate restitution as a remedy. Both justices cogently described the practical deficiencies in refund procedures, with the beneficiaries being accountants, lawyers, and special masters, and the victims being the protesting employees. 367 U.S. at 779-80 (Whittaker, J., concurring in part and dissenting in part), 795-97 (Black, J., dissenting). Justice Douglas, who provided the crucial fifth vote for the opinion of the Court did so reluctantly, specifically recognizing the strength of Justice Whittaker's and Justice Black's dissents. *Id.* at 778-79 (Douglas, J., concurring).

simply "to remind the parties of the availability of more practical alternatives to litigation, . . ." *Id.* at 122-24. The Court declared in *Allen* that "[t]he courts will not shrink from affording what remedies they may with due regard for the legitimate interests of all parties." *Id.* at 124.

Street and *Allen* were decided on statutory grounds only, and did not address the constitutional sufficiency of intra-union rebate procedures. *Abood*, which addressed constitutional issues, left that question open; it contains strong hints that such schemes cannot meet constitutional standards. The Court specifically noted that "[w]e express no view as to the constitutional sufficiency of the internal remedy." 431 U.S. at 242 n. 45. Justice Stevens also explained in his concurring opinion that:

> By joining the opinion of the Court, including its discussion of possible remedies, I do not imply--nor do I understand the Court to imply--that the remedies described in . . . *Street* . . . and . . . *Allen* would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Id. at 244 (Stevens, J., concurring) (footnote omitted).

Every federal court (other than the Ninth Circuit), and almost every state appellate court, which has considered the question has concluded that this Court did not approve rebate procedures as a remedy in compulsory fee cases. *Perry v. Local Lodge 2569, IAM*, 708 F.2d 1258, 1261 (7th Cir. 1983); *Galda v. Bloustein*, 686 F.2d 159, 167-68 n. 15 (3rd Cir. 1982); *Robinson I*, 547 F.Supp. at 1317-18; *Beck v. CWA*, 468 F.Supp. 87, 90-91 (D.Md. 1979); *Greenfield*, 385 Mass. at 81 & n. 7, 431 N.E.2d at 187 & n. 7 (1982); *Ball*, 84 Mich. App. at 393-94, 269 N.W.2d at 611-12. Indeed, the court in *Robinson I* specifically rejected *Ellis* as unpersuasive on this issue because "the major premise for the Ninth Circuit's conclusion is flawed." 547 F.Supp. at 1318.

Analysis of first amendment principles demonstrates that the Ninth Circuit's conclusion is erroneous.[23] As constitutional principles shaped the statutory analysis of the Railway Labor Act in *Street*, constitutional standards must exert controlling influence over the formulation of permissible remedies. *Street* advised that the courts "should select remedies which protect both [the protesting employee's and the union's] interests to the maximum extent possible without undue impingement of one on the other." 367 U.S. at 773. Similarly, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237.

Once an employee has stated an objection, the union is "without power to use" exacted fees for, and the employee has a "right to withhold his support of," impermissible purposes. *Street*, 367 U.S. at 771; *Abood*, 431 U.S. at 234. This rule effectuates the enduring principle that government cannot condition continued employment upon the relinquishment of individual rights guaranteed by the first amendment. *Id.* at 234-35. The Ninth Circuit's holding that protesting employees can be required to pay the full agency fee, which in part will be used to subsidize BRAC activities which are both statutorily and constitutionally nonchargeable, turns these constitutional principles on their heads. A rebate scheme conditions continued employment upon the relinquishment of the first amendment rights to freedom of speech and association and imposes a prior restraint upon the exercise of those freedoms by permitting forced loans to subsidize political and ideological activities.[24]

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[23] A union-administered rebate scheme also is unconstitutional on due process grounds because union officials make the initial determination of the amount of the rebate to be given to objectors. This violates the most fundamental notions of fair play. "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). This defect is not cured by the fact that the objecting employees may eventually get an impartial hearing on appeal; they are "entitled to a neutral and detached judge *in the first instance*." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (emphasis added); *see Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324, 330-31 (1969); *Steele*, 323 U.S. at 206; *Greenfield*, 385 Mass. at 82, 431 N.E.2d at 188.

[24] Parallel reasoning led this Court to warn that a blanket injunction against union expenditures from voluntary dues payments for disputed purposes would be improper. Such an injunction, the Court suggested, might work a restraint on the expression of the union's political or ideological viewpoints and thus might be offensive to the first amendment. *Street*, 367 U.S. at 773.

The nature of the injury to the protesting employee is irreparable. The timeliness of the exercise of first-amendment rights is of particular importance. *Elrod v. Burns*, 427 U.S. at 374 n. 29 (plurality opinion); *Walker v. City of Birmingham*, 388 U.S. 307, 336 (1967) (Douglas, J., dissenting); *Bridges v. California*, 314 U.S. 252, 268-69 (1941).

Depriving BRAC of the use of funds to which it has no legitimate entitlement injures BRAC not at all. But the diversion of protesting employees' money damages them doubly. It renders them captive to the ideas, associations, and causes espoused by others, while at the same time depleting their own funds and resources and rendering them unable to express their own ideas and support their own causes. *Elrod v. Burns*, 427 U.S. at 355-56 (plurality opinion); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970), *further proceedings*, 371 F.Supp. 754 (C.D. Cal. 1973) (Pregerson, J.), *reversed*, 533 F.2d 1126 (9th Cir. 1976); *Greenfield*, 385 Mass. at 83-84, 431 N.E.2d at 189.

Here, the span between the exaction of the full fee and the subsequent rebate has been eighteen months, a factor which contributed to the condemnation of a union's rebate scheme in the recent decision in *Perry v. Local Lodge 2569, IAM*, 708 F.2d at 1262. When full fees are paid and utilized by BRAC for political and ideological purposes in an election year such as 1976 (*see* J.A. - Exhibits 424, 445-51, 452-53, admitted Aug. 1, 1979 RT 6-8), a subsequent rebate cannot undo the irreparable injury caused by the forced support for BRAC's political efforts. The candidates elected cannot be recalled. Even in non-election years legislation passed as the result of union lobbying efforts cannot be repealed. In short, once political or ideological viewpoints have been expressed or political influence applied, they cannot be withdrawn from the marketplace of ideas, the legislative chamber, or the polling booth.

This Court has expressly refused to endorse the proposition that a wrong can be done if it can later be undone. *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)). BRAC, the district court, and the Ninth Circuit have not identified any compelling justification for a union administered rebate procedure which permits the doing of wrongs which *cannot* be undone. The lack of any such governmental interest is evident, since the union always has it within its power to obtain the chargeable portion of the fees by providing proper accounting of its collective bargaining costs.

"[C]are must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod v. Burns*, 427 U.S. at 362 (plurality opinion). Plaintiffs do not concede that such an interest exists. They do agree with the Minnesota Supreme Court's conclusion that "the governmental interest in union [*sic*] stability is not so compelling as to bar an injunction against the use of the union fees until their validity has been determined in a hearing. . . ." *Robbinsdale*, 307 Minn. at 107, 239 N.W.2d at 444.

While there is no compelling governmental interest supporting a refund scheme, "the public interest lies in protecting the non-member's First Amendment right not to further causes with which he disagrees." *Robinson II*, 113 L.R.R.M. at 3277; *see Local 1814, Longshoremen v. Waterfront Commission*, 667 F.2d 267, 272 (2d Cir. 1981); *Anderson v. City of Boston*, 376 Mass. 178, 196, 380 N.E.2d 628, 639 (1978), *appeal dismissed*, 439 U.S. 1060 (1979). That public interest was advanced in *Ball*, 84 Mich.App. at 397, 269 N.W.2d at 613, the first lower court post-*Abood* decision, in its holding that "the proper solution is to require non-members to pay the service fees into an escrow account," an alternative which avoids "the risk that [non-members'] fees may be used, even temporarily, for activities to which they are opposed" and "ensure[s] the union will have prompt access to the funds to which it is entitled after a judicial determination." *Accord Robbinsdale*, 307 Minn. at 101, 109 n. 5, 239 N.W.2d at 441, 445 n. 5 (on due process grounds). Several lower courts have used similar reasoning.

In *Perry v. Local Lodge 2569, I.A.M.*, the Seventh Circuit found that a multi-tiered rebate scheme similar to BRAC's was combersome, unfair, and not the least restrictive means of advancing governmental interests while protecting the constitutional rights of protesting employees. The court noted "the possibility that a union may employ accounting techniques to mask political expenditures," a factor which has created intolerable burdens for plaintiffs in *Ellis*. *See* pp. 26-31, *supra*. *Perry* held that "a constitutionally-permissible mode of payment did not exist," and the trial court had correctly enjoined the discharge of a dissenting employee for failure to pay an agency fee. The fee was placed in escrow. 708 F.2d at 1262-63.

In *Greenfield*, the highest court of Massachusetts recognized that requiring dissenting employees to pay the entire fee to the union before its legitimacy has been proven "forces them to subsidize the objectionable activities of the organization." 385 Mass. at 84, 431 N.E.2d at 189. The

court held "that the statutory right of the organization to the permissible amount is outweighed by the potential that the impermissible amounts will be used, even temporarily, in violation of the dissenting [employees'] First Amendment rights." *Id.* at 83, 431 N.E.2d at 188. The employees may not be required to pay the fee to the union until after the chargeable amount has been adjudicated. *Id.* at 85, 431 N.E.2d at 189.

In *Robinson I*, the court endorsed *Greenfield* and its application of *Abood*. 547 F.Supp. at 1321. The defendant unions then revised their refund, or "demand and return," systems in an attempt to make them more effective and less cumbersome. However, these new systems, more sophisticated than BRAC's, still require dissenting employees to pay the full service fee[23] and then demand a refund if they are dissatisfied with the amount of the fees.

After considering these new systems, the *Robinson* court went beyond its original holding based upon the burdensomeness of the particular characteristics of the original rebate schemes. It said:

> [U]nder the very best demand and return system no objecting non-member can devote the time and money required to ascertain and, if warranted, regain the portion of his representation fee which the union may use for political and ideological purposes. The statutory requirement of a demand and return system is an illusory remedy. As a practical matter, therefore, the statute permits a union to take the funds of objecting non-members and use them for the union's own political and ideological purposes. The good faith efforts of the union defendants in these cases to create workable systems demonstrate that no demand and return system can protect an objecting non-member's First Amendment rights.

Robinson II, 113 L.R.R.M. at 3275. The court enjoined the collection of any fees until the New Jersey statute is amended "so as to include a provision for a hearing before a state tribunal on the validity of any representation fee prior to payment of the fee to the union." *Id.* at 3278; *see also Gaida v. Bloustein*, 686 F.2d at 167-69; *Beck v. CWA*, 468 F.Supp. at 97.

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[23] The New Jersey statute established a partial bar to the payment of full fees; the rebate was deducted from the amount of the service fee, which was set at 85% of union dues.

The insightful opinions in *Robinson*, echoing the prophetic dissents of Justices Whittaker and Black in *Street*, demonstrate with unmistakable clarity that the pragmatic impact of the rebate "remedy" is the exhaustion of non-members' finances and the evaporation of those rights which lie at the heart of a truly free society. It has now taken over a decade of protracted litigation at the cost of hundreds of thousands of dollars by both sides for an individual plaintiff in this case to recover a maximum rebate of $352.69 (J.A.IV 373-96). Plaintiffs' attorneys and accountants have spent thousands of hours to invalidate two of BRAC's earlier rebate procedures, expose the BRAC/AFL-CIO money laundering scheme, and confront the herculean task of attempting to unravel BRAC's chaotic accounting practices.

CONCLUSION

Because the decision of the Ninth Circuit erroneously defined the scope of union activities which the plaintiffs may be compelled to subsidize as a condition of their employment and approved a remedy which does not prevent coerced political and ideological conformity, that decision should be reversed.

Because the district court applied an erroneous burden of proof at the trial, the plaintiffs are entitled to a remand for a new trial on the issue of damages. At trial, BRAC must prove by clear and convincing evidence, in accordance with generally accepted accounting principles, that proportion of the plaintiffs' compulsory fees which has been spent for contract negotiation, contract administration and grievance adjustment with Western Airlines. Plaintiffs are entitled to damages, with interest, as to all other amounts paid.

Finally, the district court should be instructed to enter a declaratory judgment that BRAC violated the constitutional and statutory rights of plaintiffs by maintaining a rebate procedure which tolerated the payment

and use of compelled fees for statutorily and constitutionally proscribed purposes.

Respectfully submitted,

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No. 82-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

ALLEN L. FAILS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. Proceedings In The District Court

1. *Proceedings on Plaintiffs' Political Expenditures Objection*

In 1973, the complaints herein (A. 5-22 (*Ellis*) and A. 78-96 (*Fails*))[1] were filed for 196 employees of Western Airlines required to pay union dues to the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereafter "BRAC" or "the Union")[2] pursuant to a union security agreement between Western Airlines and the Union. The complaints chiefly asserted a claim that plaintiffs' (the petitioners in this Court) dues payments were being used by the Union for *political* purposes, in violation of the First Amendment and the Railway Labor Act.

On January 6, 1975, in denying a motion by the Union for summary judgment the district judge ruled (CR 86) that the Union's limited political rebate plan was based on a standard "erroneous as a matter of law" as to the amounts to be rebated. On October 6, 1975 the Union's Executive Board adopted a political-ideological expenditures deduction system (A. 345, 425-426), which is comprehensive in its coverage, generous in the amount of the dues deduction provided, and in terms retroactive to the

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[1] "A." refers to the Joint Appendix in this Court. "Pet. App." refers to the Appendix to the Petition for Certiorari, containing opinions and orders of the courts below. "Pet. Br." refers to the Brief for Petitioners in this Court. "CR" references are to the *Ellis* docket in the district court; the docket of the consolidated *Fails* case includes parallel entries not here cited. "RT" references are to the reporter's trial transcript unless a date is specified, in which case the RT reference is to the transcript of the hearing of that date.

[2] The defendants were BRAC, one of its System Boards of Adjustment, and three of its Local Lodges.

original date of any employee's first protest. Deductible items—which have in recent years been identified as comprising about five percent of the total dues dollar—include not only disbursements for political and ideological activity, but also all legislative and lobbying costs (whether or not germane to collective bargaining), all charitable donations, and all fees for affiliations with other labor organizations (A. 421-424). The legal status of that system was not resolved until the district court issued its findings and conclusions after a trial held in 1978. At that trial there was extensive testimony by officials concerning the ongoing operation of the Union's deduction system (RT 795-99, 909-15, 960-1012, 1051-57). The ultimate finding of the district court was that plaintiffs' right of abstention from financial support of union political and ideological activity is fully protected by BRAC's system (Pet. App. 34a, ¶¶ 4, 5 quoted at pp. 9-10, *infra*). The final judgment also requires the annual reduction of plaintiffs' dues obligation by the amount of the prior year's political and ideological expenditures ratio determined under the Union system (Pet. App. 34a, ¶ 3).

2. *Proceedings on Plaintiffs' Operating Expenditures Objection*

In a summary judgment motion filed on August 26, 1975, plaintiffs asserted that objecting employees cannot be required to provide financial support for various union operating expenditures, contending that the making of such expenditures is not part of "collective bargaining" or "grievance administration."

On January 21, 1976, the district court issued "Findings of Undisputed Facts and Conclusions of Law" (Pet. App. 17a-26a) declaring that several areas of Union activity—identified in ¶ 22 of that court's findings (Pet. App. 22a)—constitute "non-collective bargaining activities" not includible in a union shop agreement authorized by the Railway Labor Act (Pet. App. 24a, ¶¶ 5,

6). On November 29, 1976, that court "clarif[ied] its earlier ruling so as to delimit the scope of costs chargeable against plaintiffs to those of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes incurred by the defendants in the representation of plaintiffs *with Western Airlines*" (Pet. App. 28a, original entirely italicized).

Among the major activities exempted by ¶ 22 from the union shop obligation were: *the Union's quadrennial national convention; union publications that include general news or entertainment material; the defense or prosecution of litigation not having as its subject contract negotiation or administration; BRAC's death benefits program, which covers all represented employees; social and recreational activity; and organizing of additional employees of the same or other employers.*

3. *The Trial*

Under a pretrial order issued on April 11, 1978 (A. 255-266), the trial issues were significantly narrowed. The Union agreed (A. 261-262) that if ¶ 22 were ultimately judicially sustained, the Union would return to plaintiffs all their dues payments to the Grand Lodge between 1972 and 1975. Accordingly, the focus of the 1978 trial evidence concerning the Grand Lodge was confined to the years 1976 and 1977, for which data were more readily available. It was further agreed that there would be no relitigation of the legality of the rulings in ¶ 22. Under an additional pretrial order provision, placing the burden of proof upon the defendant Union to demonstrate the proportion of its budget expended on ¶ 22 items, it was the defendants who presented their case first at the trial.

Officials of the three defendant Locals in this case produced all their relevant books and records and testified in detail concerning all disbursements made and all Union activities undertaken on a compensated basis (RT 163-

231, 313-53, 370-89, 424-64, 484-517). They demonstrated that the total of the expenditures of their Locals for ¶ 22 items (other than those already encompassed in the Union's dues deduction system) is minuscule both in significance and amount. Typically such outlays are for refreshments at the monthly Local meeting or for flowers sent to the bereaved relatives of a deceased employee (e.g., RT 213-16, 380-83, 458-62). As a percentage of the Local dues, these and all other ¶ 22 outlays in 1977 represented, *in toto*, 2.4%, 1.2%, and 0.3% of disbursements by Local Lodges 3014, 3001 and 3049 respectively (RT 213-16, 380-82, 458-64, summarized for CR 297 Att. I). A similar result obtained in the defendant System Board; in 1977 its ¶ 22 outlays represented less than 1% of its total expenditures (RT 633-48, 722-29).

The Grand Lodge figures were significantly higher. Defendants' itemized calculations show that some 40% of total Grand Lodge outlays in 1976 and 37.8% of its total outlays in 1977 went for the activities covered by ¶ 22 (Def. Trial Exhibits B (reproduced at A. 401) and C). The Grand Lodge calculations were confirmed by the Union's President, its Secretary-Treasurer, and its Comptroller. They testified in detail to each of the 66 separate line items appearing in Exhibits B and C which encompassed all of the Grand Lodge's annual outlays.

In response to the testimony of defendants' witnesses, plaintiffs, who had engaged in extensive pretrial discovery, produced only three witnesses of their own, two of whom were accountants objecting to the absence of a standardized system of bookkeeping allocating Union outlays by ¶ 22 functions. The district judge, however, expressed the view (RT 802-03) that the Union should not be expected to alter its bookkeeping system until ¶ 22 of his ruling was affirmed on appeal. That is the view to which the district court adhered in framing its final orders (Pet. App. 3a, ¶ 10).

4. *The Opinion and Judgment of the District Court*

The district court's opinion, expressed in its "Findings of Fact and Conclusions of Law" issued on March 14, 1980, accepted defendants' proof that at the local and intermediate levels of the Union there are only minimal expenditures on ¶ 22 items, whereas about 40% of the outlays of the Grand Lodge are for ¶ 22 items (Pet. App. 31a-32a, ¶¶ 7-12.) These rulings were incorporated in the judgment entered on July 7, 1980 (Pet. App. 33a-35a).

B. Proceedings in the Court of Appeals

On plaintiffs' appeal the court of appeals unanimously rejected their contentions: (A) that BRAC's present political-ideological expenditures deduction system is illegal; (B) that the district court should have required the defendants to establish by "clear and convincing evidence" the proportion of nonchargeable expenditures to total expenditures; and (C) that the district court erred in accepting BRAC's books and records, which plaintiffs claimed do not satisfy generally accepted accounting principles and should have been organized according to the categories first articulated in the district court's ¶ 22 ruling (Pet. App. 5a-8a).[3]

On the Union's appeal, the court of appeals, with one Judge dissenting, reversed the district court's ruling that the ¶ 22 expenditures are not chargeable to plaintiffs (Pet. App. 9a-13a). The court of appeals concluded that "each of the challenged expenditures can be seen to promote, support or maintain the union as an effective collective bargaining agent and therefore such expenditures are germane to the work of the union in the realm of collective bargaining" (Pet. App. 13a-14a).

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[3] The court of appeals also rejected claims of procedural error asserted by plaintiffs but not renewed here (Pet. App. 8a-9a).

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The court of appeals in rejecting the argument of the objecting employees "that they cannot be charged for certain major operating expenditures of the union * * * [that are] not 'political' or 'ideological' " (Pet. App. 3a, 4a), held:

> [T]he relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. This formulation respects and protects dissenters' rights, but does not needlessly weaken the union, whose viability is necessary to secure and maintain industrial peace. [Pet. App. 10]

That holding, which is based on this Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 255 (hereafter *"Hanson"*), *Machinists v. Street*, 367 U.S. 740 (hereafter *"Street"*), *Railway Clerks v. Allen*, 373 U.S. 113 (*"Allen"*), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (*"Abood"*), accurately reflects Congress' intent in enacting §2, Eleventh of the Railway Labor Act and is entirely consistent with the First Amendment's requirements.[4] For Congress' purpose was to further perfect a system for the "self-adjustment of the [railroad and airline] industry's labor problems between carrier

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[4] The first three of these cases, like the present, involve employees and labor organizations subject to the RLA. The Constitution was held to apply to union security agreements made pursuant to that statute, because the RLA provides that such an agreement is lawful "[n]otwithstanding any other provisions * * * of any other statute or law * * * of any State" (§ 2, Eleventh). A union security agreement made pursuant to the RLA, therefore, by force of the Supremacy Clause of Article VI of the Constitution, cannot be invalidated by any state law. *Hanson*, 351 U.S. at 232. This differentiates the RLA from the National Labor Relations Act, § 14(b) of which provides that state laws prohibiting union security agreements are *not* preempted by the NLRA. See *Abood*, 431 U.S. at 218, n.12. In *Abood* itself the Constitution was applicable because a *state* agency was a party to the union security provision and the payment required by that provision was a condition of continued public employment.See *id.* at 226.

organizations and *effective labor organizations.*" *Street*, 367 U.S. at 759, emphasis added. And Congress understood that effective labor organizations, like all ongoing organizations, incur a wide range of operating expenses, and therefore concluded that the cause of labor peace would be furthered by permitting arrangements whereby all represented employees make an equal financial contribution not to some artificially segmented portion of their exclusive representative's activities but to all of the activities that enable the representative to play its appointed role in the industrial relations system established by the RLA. The *Hanson* line of authority, in turn, shows that Congress' purpose in this regard does not impose an unconstitutional burden on objecting employees.

II. The record demonstrates that the court of appeals correctly concluded that each of the six classes of national union operating expenditures challenged here is "germane to the union's work in the realm of collective bargaining." With respect to Grand Lodge organizing, it is particularly to the point that this Court has for half a century recognized that organization is imperative to eliminate the adverse effects of substandard wages, to make collective bargaining effective and to maintain the standards achieved through such bargaining. Additionally, petitioners' contention that only expenditures for collective bargaining and grievance handling with the objecting employee's employer are chargeable cannot be reconciled with Congress' special concern for the financial needs of *national* unions.

III. Petitioners' standard-of-proof contention—that the defendant union must establish by "clear and convincing evidence" the portion of its budget expended on items not chargeable to objecting employees, and the corollary of that argument, that the trial court should have required BRAC to produce accounting records categorized according to those items—is based on their asserted First Amendment interests. That contention overlooks the recognition in *Street*, *Allen* and *Abood* that the rights of the *non-objectors* and of the objectors must be given

equal weight in determining the dues obligations of each. Accordingly, the preponderance-of-the-evidence standard was correctly applied: "Any other standard expresses a preference for one side's interests," *Herman & MacLean v. Huddleston*, —— U.S. ——, 51 L.W. 4099, 4103 (January 24, 1983). Moreover, petitioners' theory is supported by none of the cases they cite, and is squarely refuted by *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274. Petitioners' criticism of BRAC's accounting records is without merit also because those records were endorsed by the two courts below in determining the proportion of nonchargeable expenditures from those records and unimpeached supporting testimony. More fundamentally, petitioners' argument is inconsistent with *Allen* where this Court said: "Absolute precision in the calculation of such proportion [of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." 373 U.S. at 122.

ARGUMENT

I. The "Germane to the Union's Work in the Realm of Collective Bargaining" Standard Adopted by the Court of Appeals from *Railway Clerks* v. *Allen*, 373 U.S. 113, Fulfills the Objectives of § 2, Eleventh of the Railway Labor Act and Meets the Constitution's Requirements

(a) *Abood* summarizes the two basic legal propositions settled by this Court in *Hanson* and its progeny and states the question, not yet squarely answered, posed by this case.

First, the union shop as such is constitutional:

> To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. • • • But the judgment clearly made in *Hanson* and *Street* is that such interference [with these First Amendment in-

> terests] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. [*Abood*, 431 U.S. at 219, 222.]

Second, one certain limit to the union shop, established in *Street* and reaffirmed in *Allen* and in *Abood*, is that § 2, Eleventh of the RLA and the First Amendment require that "funds for the [union's] expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative * * * be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Abood*, 431 U.S. at 235-236.

Finally, the *Hanson* line of cases does not solve the "difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Abood*, 431 U.S. at 236.

(b) We pause before turning to the solution to that problem to show that one part of the judgment issued by the district court, affirmed by the court of appeals and not challenged by the Union here incorporates the limitation on the union shop stated in *Street*, affirmed in *Allen* and in *Abood*, and set out directly above.

On the basis of extensive trial testimony and exhibits the district court, in findings and conclusions endorsed by the court of appeals, ruled that petitioners' right to refrain from financial support of Union political activity and ideological activity unrelated to collective bargaining is fully protected:

> 4. On October 6, 1975, BRAC adopted a rebate plan encompassing all political and legislative expenditures of the Grand Lodge and subordinate units, as well as all ideological expenditures and all dues and

contributions to other labor federations, organizations and charities. That plan is a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963). The Grand Lodge Board of Trustees annually computes political-ideological rebates due to any protesting dues payer for the prior calendar year. These are computed on the basis of forms submitted by subordinate units and upon reports of political time and expenditures by Grand Lodge personnel which are contemporaneously logged on the Grand Lodge computer system throughout the calendar year. Any employee who believes his rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals. Members of the Board include former Governor Edmund G. Brown, Dean Soia Mentschikoff and Reverend Preston Bradley.

The Board of Trustees' computation for calendar year 1975 disclosed that 4.68% of the Union's total income from dues and fees had been expended for items included in the rebate plan, and each plaintiff in this suit was sent a refund check for that proportion of his 1975 dues payment, as well as for each earlier year back to the date of his initial dues protest. The rebate computation for 1976 was 4.9%, and each plaintiff was then sent that amount for 1976 plus the amount necessary to increase to 4.9% the rebate for each prior year since his protest. Plaintiffs have also been sent their rebates for 1977, amounting to 5.4% of their dues payments in that year. No plaintiff has appealed to the Public Review Board, although each has been advised of his right of appeal. 5. On the basis of the above finding, the Court concludes that plaintiffs' rights in the political-ideological area have been vindicated by the rebates they have received and are protected for the future by the rebate plan. [Pet. App. 30a-31a]

The Union's internal system just described is supplemented by the district court's judgment which "*reduces the dues payment obligation of any plaintiff for each calendar year*" by the "preceding calendar year['s]" ratio of union political and ideological expenditures to total union expenditures (Pet. App. 34a, emphasis added).

Thus, the system approved by the district court, embodied in its judgment, and affirmed in this respect by the court of appeals, does *not*, as the petitioners claim, "allow[] a dissenters' agency fee to be used for impermissible purposes subject to a later union determined rebate." Pet. Br. 31 (Heading). Rather, the district court's judgment tracks this Court's suggestion in *Allen*, 373 U.S. at 122, of a "practical decree," by providing both for a "refund" from dues already paid and for a "reduction of future [dues]." The question whether a straightforward rebate system that requires payment of full dues and a later return of a portion of those dues is, as petitioners contend, legally inadequate is academic in this case. And, petitioners make no showing that the courts below committed any error of law in concluding that the Union's internal system encompasses *all* the Union's expenses "for the expression of political views, on behalf of political candidates or toward the advancement of other ideological causes not germane to its duty as collective-bargaining representative." *Abood*, 431 U.S. at 235.[5]

(c) We now return to the line-drawing problem set out in *Abood*, and contemplated in *Street*, where the Court "embraced an interpretation of the Railway Labor Act not without its difficulties * * * precisely to avoid facing the constitutional issues presented by the use of union shop dues for political and ideological purposes unrelated to collective bargaining." *Abood*, 431 U.S. at 232.

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[5] **Accordingly we believe that Question 3 in the petition discussed at Pet. Br. 31-38 is not justiciable on this record. The writ of certiorari should in this regard be dismissed as improvidently granted. Cf. *Mishkin v. New York*, 383 U.S. 502, 513-514.**

i. While not dispositive, it bears emphasis at the outset, see e.g. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 198, that § 2, Eleventh, *in terms*, permits carriers and labor organizations to enter into agreements providing that all employees covered thereby are "to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." That section does not provide for deductions from those dues, fees and assessments nor does the section place limits on how those moneys once paid are to be spent.

In *Street*, to be sure, this Court's review of the legislative history led to the conclusion that Congress' intent in enacting § 2, Eleventh was to serve "the limited purpose of eliminating the problems created by the 'free rider.'" 367 U.S. at 767. And the *Street* Court concluded as well that the free rider problem does not include an employee's refusal "to support *political causes he opposes*," because that "is a use [of required dues] which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified * * * [and] is a use to support activities within the area of dissenters' interests which Congress enacted the proviso to protect." *Id.* at 768, emphasis added. Thus, under *Street*, the central inquiry is into the 1951 Congress' understanding of the nature and dimension of the "free rider problem".

According to the petitioners, the free rider problem begins and ends with an objecting employee's refusal to pay a proportionate share of the direct immediate cost to the union of sitting at the bargaining table and negotiating a collective agreement with that employee's employer and of presenting grievances under that agreement to arbitration and judicial tribunals. On this theory, it is said to have been Congress' view that the ordinary operating expenses of a national union to govern itself in a democratic fashion, to seek to organize and to con-

clude collective agreements with as many employers as possible, to communicate with its constituents and to engage in like activities are just as "clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified" (*Street*, 367 U.S. at 767) as union expenditures on "political causes."[6] Congress, however, had a larger

[6] Petitioners' reliance (Pet. Br. 17) on *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 752-754 in support of the "distinction" they would establish between "collective bargaining costs" and "institutional expenses" (all of which, say petitioners, are not chargeable to objecting employees) is wholly unwarranted. The context in which those words were used was entirely different from that of this case and the *Schermerhorn* Court did not, even by way of *dicta*, declare that "collective bargaining" and "institutional" expenses are mutually exclusive categories. The question decided in *Schermerhorn* was whether, pursuant to a collective agreement entered into by parties covered by the *NLRA*, employees who do not become members of the union could lawfully be required to pay "service fees", which were equal to the dues charged to union members, in a state which outlawed such agreements, and notwithstanding § 14(b). See 373 U.S. at 749. Neither *Street* nor *Allen* (which had been decided earlier at the *Schermerhorn* term) were cited.

The *Schermerhorn* Court first set forth a description by the petitioners in that case of a provision of their agreement—"a provision which petitioners say confines the use of nonmember payments to collective bargaining purposes alone and forbids their use by the union for *institutional purposes unrelated to its exclusive agency functions* * * *." 373 U.S. at 752, emphasis added. And it was that provision, so described, that the Court considered and found to be subject to the state's "right to work" law. The phrase "institutional purposes unrelated to [the union's] exclusive agency functions" defeats the present petitioners' attempt to misuse *Schermerhorn* since the very words used allow for the possibility of "institutional expenses *related* to [the union's] exclusive agency functions." Of course, it is our contention here that in § 2, Eleventh Congress considered a national union convention and like activities to be related to the union's exclusive agency functions as, indeed, those activities are.

In this connection it is plain that the *Schermerhorn* opinion's description of expenses that are not for collective bargaining at 373 U.S. 753, n.6 is solely that of the *Schermerhorn* petitioners, whose

view, in accord with the practical realities, of the labor relations system that promotes industrial peace in this society and of the union role in that system.

ii. The record in this case shows that the Union, like all national unions, has substantial operating expenses of the kind at issue in this case. This is not a new reality and the proponents of § 2, Eleventh recognized as much by speaking in general terms of the union costs that would be covered by union security clauses. The statement quoted in *Street* of George Harrison, the primary spokesman for the railroad unions, is typical:

> "Activities of labor organizations resulting in the procurement of employee benefits are costly, and the only source of funds with which to carry on these activities is the dues received from members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits

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brief is there quoted. Petitioners here nevertheless rely on that list in asserting that publications and litigation are not chargeable to objecting employees. Pet. Br. 22, 23. Of course, if there were any validity to their position that *Schermerhorn's* discussion of collective bargaining and institutional expenses is precedent for this case, the present controversy concerning the other four categories at issue here (which are, in the aggregate, far more significant) must be decided in BRAC's favor. However, we disavow any reliance on *Schermerhorn*, because the Court said and decided nothing there bearing on the present case.

Petitioners compound their error by claiming significance in *Abood's* quotation of *Schermerhorn*. Pet. Br. 17. Here again, petitioners distort a decision of this Court by wresting language out of context—in this instance the *Abood* Court's discussion of the appropriate remedy. The point, both in *Schermerhorn* and in *Abood*, is that "even if all collections from nonmembers must be directly committed to paying bargaining costs, this fact is of bookkeeping significance only rather than a matter of real substance" where, as in *Schermerhorn*, "the service fee is admittedly the exact equal of membership initiation fees and monthly dues." See 373 U.S. at 753 quoted 431 U.S. at 237, n.35. Here, of course, objecting employees are not required to pay full dues, but only dues *less* the cost of the Union's political activity and ideological activity unrelated to collective bargaining.

> of those activities without contributing anything to the cost. This is especially true *when the collective bargaining representative is one from whose existence and activities he derives most important benefits* and one which is obligated by law to extend these advantages to him." [367 U.S. at 761-762, emphasis supplied]

Thus, the union spokesman in stating the free rider problem made it plain at the outset that the problem did not pertain to the objecting employees' refusal to contribute to the direct cost of collective bargaining narrowly understood, but to the refusal of those employees to bear their proportionate share of the expenses of the "collective bargaining representative * * * from whose existence and activities he derives most important benefits." [7] Only then ("[f]urthermore"), does the statement

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[7] Throughout his testimony Mr. Harrison made the point that the union shop would require that the employee "participate in the collective action through support of the union which represents him." House Hrgs. 9; Senate Hrgs. 15. Indeed, the union witnesses repeatedly described the union shop as requiring covered employees to "support the union," (House Hrgs. 85) and "share the costs of th[e] labor organization" (House Hrgs. 228). See also, House Hrgs. 50, 275; Senate Hrgs. 130, 237. This understanding was shared by the amendment's proponents in Congress. Senator Hill, the bill's floor manager, described the union shop as requiring "a fair contribution to the support of the unions" (96 Cong. Rec. 16279, Leg. Hist. 1166), and Rep. Linehan described § 2 Eleventh as requiring "that those who accept the benefits secured by an organization shall also share equally in the expense of operating such organization." (96 Cong. Rec. 17058, Leg. Hist. 1269).

"House Hrgs." refers to Hearings on H.R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. (1950). "Senate Hrgs." refers to Hearings on S. 3295, Subcommittee of Senate Committee on Labor and Public Welfare, 81st Cong., 2d Sess. (1950).

"Leg. Hist." refers to the Committee Print (Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess.), Legislative History of the Railway Labor Act, as Amended (1926 through 1966) (G.P.O. January 1974).

go on to specify as a basis for § 2, Eleventh the costs of collective bargaining and to emphasize that under the RLA those costs are particularly heavy. *Id.* at 761-762. Moreover, in describing that collective bargaining, Mr. Harrison referred to the costs of an overall national system of bargaining and grievance adjustment involving national unions. In that regard the 1951 "Congress clearly had [the] consideration[] in mind * * * when it authorized union shop agreements notwithstanding any state law" that "the principal unions in the railroad industry are national in scope and * * * [b]argaining collectively * * * has often taken on a national flavor and agreements are uniformly negotiated for an entire railroad system." [8]

Consistent with the nature and needs of national labor organizations, Mr. Harrison made it plain that the costs of a national convention are included in the kind of costs to which § 2, Eleventh was addressed:

> Mr. HINSHAW. Exactly what do you mean by the term "assessments"?
>
> * * * *
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> Mr. HARRISON. We have a situation among some of the railroad organizations, Congressman Hinshaw. For instance, let us take my own organization—the clerks. A man pays his dues, and that covers all the activities of the union. We split that up internally between the activities of the union. On the other hand, let us take one of the train-service brotherhoods; for instance, the Brotherhood of Locomotive Firemen and Enginemen. The employee will pay his dues, which will be nominal, and then he will pay an assessment to finance the activities of the general negotiating committee, known as the general grievance committee on the railroad where he is employed, and he will pay that monthly, and it will vary month by month, based on the expenses and work of that

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[8] *California v. Taylor*, 353 U.S. 553, 567 & n.15 citing House Report, No. 2811 on H.R. 7789 p. 5 (August 7, 1950).

committee. It may be that they have an international union convention every 4 years and they have a convention expense assessment to cover the cost of holding those conventions. The fireman would pay that expense as an extra assessment over and above his dues, while in my union the dues would cover all of that, and we would make a distribution internally to the different funds. [House Hrgs. 257-258]

And it was also clearly stated that the dues payment provided for in § 2, Eleventh would cover illness and death benefits.[9] Indeed, the proponents of § 2, Eleventh insisted that union security agreements would cover all the expenses of the union as a union.[10]

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[9] Mr. O'HARA. Now, there is one other question involved in this situation that I would like to get your opinion on. Is it true that certain of the brotherhoods have in addition to the membership certain insurance or other benefits, illness benefits, or death benefits?

Mr. HARRISON. I think all of the unions have benefits of one kind or another. A minority of the unions conduct a life-insurance business and issue individual life-insurance policies.

Mr. O'HARA. As the brotherhoods?

Mr. HARRISON. As the brotherhoods, yes. That is principally true in the so-called operating trades, and I think the Order of Railroad Telegraphers, and one or two of the mechanical trades in the shops.

Otherwise, the balance of the railroad unions have benefit systems. Take my own union, for example: We pay a death benefit of $300, in case of death, to the designated beneficiary, 1 year after becoming a member of the brotherhood, and the member pays nothing directly for that. We pay it out of the grand lodge per capita taxes we get from the local unions. [House Hrgs. 42]

[10] Senator DONNELL. Is there any limit to the amount of the assessment that can be put on by the labor union under this bill?

Mr. HARRISON. There isn't in the bill, Senator, but all the unions have constitutions that have been in existence, some of them, for as long as 100 years, and in my union it is 50 years old.

Senator DONNELL. So if a strike may be in progress there is nothing in this bill and nothing in any law that would

iii. The scope of § 2, Eleventh follows directly from the basic theory of the RLA. The *Street* Court adopted Justice Frankfurter's earlier description of the system of labor relations in the railroad industry—the industry that provided the focus for the 1951 debate:

> "It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies. . . . The assumption as well as the aim of the Act [of 1934] is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other." *Elgin, J. & E. R. Co.*, v. *Burley*, 325 U.S. 711, 752-753 (dissenting opinion). [367 U.S. at 760]

Two major elements of this system bear emphasis. First, the 1934 RLA amendments were designed "to strengthen the position of the labor organizations vis-a-vis the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and *effective labor organizations.*" *Street*, 367 U.S. at 759, emphasis added. Second, "[i]n addition to thus strengthening the unions' status in relation to both the carriers and the employees, the 1934 Act created the National Railroad Adjustment Board and provided that the 18 employee representatives were to be chosen by the labor organizations national in scope." *Id.* at 760, citing to § 3 of the RLA.

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restrict the assessments which the union could take out of a man's wages, without his consent, for the strike benefit?

Mr. HARRISON. Answering your question, Senator Donnell, there is nothing in the bill that in any way restricts what the union might do in the way of assessments, but all the unions have constitutions which control that. [Senate Hrgs. 33]

See also House Hrgs. 71 & 262.

As the *Street* Court recognized, it was this system that Congress sought further to perfect in enacting § 2, Eleventh at the unions' behest. And it is indisputable that in the collective bargaining (including grievance adjustment) Congress sought to promote, the principal responsibility on the union side was exercised by the existing "labor organizations national in scope." Indeed, that "*group* of unions, a group already constituted" received special protection in § 2, Eleventh (c), which provides that for certain of the operating crafts membership in any of those unions would satisfy the membership requirements of subsection (a). *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, 494, emphasis in original. Moreover, in fulfilling their statutory responsibilities, these unions were matched against the railway carriers, which included some of the largest corporate enterprises in the country.

Thus, there can be no doubt that reading § 2, Eleventh to exclude the substantial operating expenses of the kind borne by every one of these national labor organizations would cut deeply against Congress' overall purpose in enacting and in amending the RLA—"securing self adjustment of [industrial controversies] between the effectively organized railroads and the equally effective railroad unions."

iv. The legislative history reveals other "problems created by the 'free rider' " very much on Congress' mind.

Perhaps the most important of these "problems" was that the presence of "free riders" and the constant possibility that union members could drop out and become "free riders" created pressure on the unions to act less responsibly in collective bargaining. William Grogan of the Transport Workers Union explained in his testimony before both Houses:

> It is also a fact that under open-shop conditions there is a demand on union leadership forever asking improvements in wages and working conditions without regard to their practicability or even their

> possibility of achievement. The union had to bid for membership and it is forced into a perpetual war with the employer to retain that full membership which a union requires to be effective. [Senate Hrgs. 88; see also House Hrgs. 28] [11]

A related "problem" stressed by § 2, Eleventh's proponents is that the open shop creates a financial incentive for employees not to fully participate in the statutory system of labor relations. For example, during the floor debate, Rep. Linehan, a member of the House Committee that reported out the bill, stated:

> It should be remembered that the Railway Labor Act has, as its foundation stone, the principle that genuine collective bargaining is the way to peaceful relations between labor and management—the way to uninterrupted transportation.
>
> Certainly, collective bargaining can function more effectively if the union voices the sentiments of all the employees and if it is supported by all the employees. [96 Cong. Rec. 17058; Leg. Hist. 1270] [12]

Finally, the general beneficial impact on the morale of the majority should the much-resented "free riders" be required to lend their support to the union was repeatedly emphasized:

> This bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the "free riders" in their midst—the men who take the gains which unions win through long and costly struggles, but refuse to pay one penny toward the expense involved.
>
> Such a situation creates friction. It makes for hard feelings. It lowers morale. It affects output

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[11] See also Senate Hrgs. 16 and House Hrgs. 11, 22-23 (Mr. Harrison); Senate Hrgs. 117-118 and House Hrgs. 226 (Mr. Monahan for URW-CIO); House Hrgs. 131 (Rep. Beckworth).

[12] See also Senate Hrgs. 16, & 130; House Hrgs. 10-11, 49-50.

> and productivity. Without question correction of such situations will raise morale and make for greater productivity. [96 Cong. Rec. 17058; Leg. Hist. 1269-1270 (Rep. Linehan)] [13]

Again, given the substantial operating expenses of national unions, the construction of § 2, Eleventh proposed by petitioners cuts deeply against achievement of each of these purposes.

v. Two further points on the legislative materials are, we believe, particularly pertinent.

First, we have not found, nor have petitioners or the courts below cited, a word in the legislative history to the effect that § 2, Eleventh covers only the direct immediate cost of negotiating and administering a collective agreement with the objecting employee's employer.

Second, the "area of dissenters' interests which Congress enacted the proviso [to § 2, Eleventh] to protect" (*Street*, 367 U.S. at 768) is wholly distinct from the area at issue in this case. As the *Street* Court stated:

> [I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." That policy survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent. [*Street*, 367 U.S. at 767]

Section 2, Eleventh, then, makes "inroads" into the previously unlimited domain of "the policy of full freedom of choice" to make room for the policy "of eliminating the problems created by the 'free rider.'" And, as we have just shown, the failure of objecting employees to pay their proportionate share of national union operating expenses, such as those at issue here, was recognized by Congress to be a critical component of the "free rider problem."

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[13] See also Senate Hrgs. 16, 130 & 236-237; House Hrgs. 11, 50 & 275.

vi. The showing to this point demonstrates that this case is governed by *Hanson's* holding and is not affected by the constitutional question that the Court reserved in *Hanson* and that in *Street* counseled the Court to "embrace[] an interpretation of the Railway Labor Act not without its difficulties" (*Abood*, 431 U.S. at 232).

It is conceivable that Congress could have limited the scope of the union shop so as to benefit only inherently unstable atomistic entities each with a half-life limited to that necessary to negotiate a collective bargaining agreement with a particular employer or to settle a grievance. But given the history of labor relations in this country—particularly the high degree of organization on the employer side and the propensity of those effectively organized employers to oppose employee organization and collective bargaining—it is extraordinarily unlikely that such a system would have succeeded in advancing Congress' purposes in enacting and amending the RLA. Congress therefore did not proceed in that direction; rather Congress' scheme for furthering industrial peace through the "self-adjustment * * * of industrial disputes" has been based on enhancing the opportunity of employees to meet the "effectively organized railroads" through larger, more complex and potentially more stable entities—"equally effective railroad unions." *Street*, 367 U.S. at 760. The proponents of § 2 Eleventh—the existing "labor organizations national in scope" (*id.*) who initiated the union shop proposal and the Senators and Congressmen who found merit in the proposal—were well aware that effective ongoing enterprises do not continue on momentum alone but must spend time, effort and money on such matters essential to maintaining their internal coherence as governing themselves, communicating with their constituents on the organization's activities, bringing and defending lawsuits concerning all facets of those activities and adapting to the changing circumstances generated by a dynamic economy. And the legislative materials show that § 2, Eleventh was intended to cover such operating

expenditures and that a failure to do so would thwart Congress' plan for industrial peace.

Thus, what this Court said in *Hanson* is dispositive here:

> Congress has authority to adopt all appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, 570. * * * Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained. * * * The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary.
>
> * * * The only conditions to union membership authorized by § 2 Eleventh of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments." The assessments that may be lawfully imposed do not include "fines and penalties." *The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary.*
>
> * * * *
>
> * * * If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that *the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the*

First or the Fifth Amendment. [351 U.S. at 233-235, 238, emphasis added.]

Thus, *Hanson* establishes that required "financial support [that] relates * * * to the work of the union in the realm of collective bargaining" is *not* "the exaction of dues * * * as a cover for forcing ideological conformity or other actions in contravention of the First Amendment." Nothing in *Street*, *Allen* or in *Abood* or in any other of this Court's subsequent First Amendment decisions qualifies in any way *Hanson's* holding. Indeed, *Street* answers petitioners' "strict scrutiny" theory, which is the sole support for their contention that § 2, Eleventh is unconstitutional if the section covers the union operating expenditures at issue here. Pet. Br. 7-10. That thesis proceeds from the assumption that only the objecting employees' First Amendment rights are at stake, whereas *Street* holds that the *majority* also has First Amendment rights entitled to equal protection:

> [T]he majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other. [367 U.S. at 773]

The Court reaffirmed that holding in *Allen*:

> [N]o decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities *germane to collective bargaining* and, as well, to expend nondissenters' such exactions in support of political activities. [373 U.S. at 122, emphasis added]

The foregoing was then quoted with approval in *Abood*, 431 U.S. at 239-240, n.40.

If the objectors were permitted to pay *less than* their pro rata share of all expenses germane to the work of the

unions in the realm of collective bargaining—the *nonobjectors* would have to pay a *greater* share of those expenses and *their* First Amendment rights would be infringed.

II. The Court of Appeals Correctly Concluded that the National Union Operating Expenditures at Issue Here Are Chargeable to Objecting Employees Covered by an RLA Union Security Agreement

The court of appeals concluded that each of the six classes of national union operating expenditures challenged here is chargeable to objecting employees. Following the sequence of that court's discussion we now show that its conclusion in each instance is correct. We then turn to and answer separately petitioners' contention that § 2, Eleventh covers only expenditures for collective bargaining and grievance handling with the objecting employee's employer.

(a) Grand Lodge Conventions

Congress clearly understood that dues collected under § 2, Eleventh would be used to finance national union conventions. See pp. 16-17 *supra*. The district court nevertheless held that *none* of BRAC's convention costs are chargeable to objecting employees. In reversing that ruling the court of appeals stated:

> BRAC represents 200,000 employees throughout the country. The Grand Lodge is either in charge of or directly involved in negotiating the collective bargaining agreements pertaining to most of those employees. The quadrennial convention is an important forum for rank and file participation in determining the Grand Lodge's collective bargaining policies. [Pet. App. 11a]

The foregoing is amply documented in the record.

The basic function of the Grand Lodge is to carry out and support collective bargaining. As BRAC President Kroll put it, "really the main function is collective bargaining, obtaining agreements for the people [that] pay

fair wages and decent benefits, and to police those contracts, to constantly administrate them and help the people out" (RT 25). In the case of most of the 200,000 employees represented by BRAC the Grand Lodge is either directly in charge of the negotiation of their collective bargaining agreements or closely involved therein (RT 45).[14]

BRAC's quadrennial convention is the "absolute authority of the union," the means through which authority, "at the top and the bottom, lies with the rank and file" (RT 16-18). Among the duties imposed by the BRAC Constitution upon the convention and its official committees are setting basic policy, acting on resolutions and petitions of the membership, resolving appeals from decisions of the international president and executive council, electing international officers, inquiring into the Union's management and financial standing, and acting on recommendations regarding retirement and unemployment insurance (CR 291 Ex. A, Art. 8). The ultimate significance of the convention in collective bargaining is summarized in the affidavit of Professor Lloyd Ulman, an eminent labor economist who is Director of the Institute of Industrial Relations at the University of California at Berkeley (A. 201-202):

> National unions tend to be large, pluralistic organizations in which substantive differences in economic priorities have to be hammered out among the mem-

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[14] In describing this role, President Kroll gave examples which included his personal involvement in negotiation of the most recent Western Airlines contract (RT 21-25). He also enumerated the activities of International Vice Presidents in contract negotiation and in representation at arbitration and before Public Law Boards (e.g., RT 35, 36), and in supporting subordinate unit activities—for example, assistance on health and welfare questions and pension improvements (RT 36, 37-38). Grand Lodge staff members engage in similar collective bargaining support (RT 40-47). In one instance the Grand Lodge saved the jobs of many Western Airline employees by successfully representing their interests through grievance arbitration (RT 41).

> bers * * *. [U]nion elections and conventions provide a means for arriving at a consensus on all of the myriad issues which affect local and national bargaining strategies. [A. 207]

The 1975 BRAC Convention Proceedings, covering a week of activity, illustrate Professor Ulman's point about consensus and "the myriad issues which affect local and national bargaining."

A major item of business at the Convention was the election of national officers.[15] Petitioners denigrate this activity as "intra-union politics" which they contrast "with collective bargaining with Western Airlines" (Pet. Br. 21). But the intimate relationship between the democratic election of union officers and collective bargaining by the union with each of the employers whose employees the union represents should be self-evident. Congress has not only acknowledged, but has acted upon, that truth by enacting Title IV of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") whose "special function * * * is to insure 'free and democratic' elections". *Wirtz v. Bottle Blowers Assn.*, 389 U.S. 463, 470. See especially *id.* at n.9 quoting identical Senate and House Reports declaring the Government's obligation to provide for such elections because unions have been vested with power as exclusive bargaining representatives by the NLRA and the RLA. Indeed, it is by virtue of its status as a bargaining representative (and that of its subsidiary bodies) that BRAC is considered a "labor organization" for purposes of the LRMDA (see §§ 3(i)

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[15] Arguments and speeches relating to various candidates emphasized accomplishments and qualities such as economic gains for represented members (e.g., CR Ex. S, pp. 72-73), leadership in negotiations (e.g., *id.*, p. 68), experience in handling union problems (179), negotiating ability and experience (180), belief in fiscal responsibility (1981), tenacity in dealing with management (184), numbers of cases processed and claims paid to employees represented (189), the number of bargaining agreements handled (190), and won-lost records before Public Law Boards and Special Boards of Adjustment (193).

and (j), 29 U.S.C. § 401(i) and (j)), and as such is required to elect national officers not less often than once every five years by referendum or convention (see § 401(a), 29 U.S.C. § 481(a)). The fact, seized on at Pet. Br. 21-22, n.16, that Congress permitted the alternative of a referendum does not affect, let alone sever, the relationship between conventions and collective bargaining. BRAC elects at conventions, as do most national unions; the referendum option has been considered but rejected on the basis of the delegates' greater knowledge of the candidates' abilities, the time that would be taken from union business by campaigning, and the cost (CR 155 Ex. S, pp. 143-44). To enable objecting employees to escape paying their proportionate share of convention costs because the majority has chosen the convention method of election which Congress authorized would be wholly inconsistent with the majority's rights as recognized in *Street* and *Allen*.

A second major area of convention concern involved the Union's internal structure and fiscal management. The delegates considered and approved a dues increase and considered revisions in the dues structure and distribution (e.g., CR 155 Ex. S, pp. at 20-21, 46-59, 433-44, 457-62); reviewed the finances of the Union (e.g., 145-48, 405-13); created an Air Transport Division (351-52); resolved appeals and proposals for the restructuring of subordinate units, debating whether employee representation was more effective under the old or new arrangements and whether the procedures followed were sufficiently democratic (e.g., 132-43, 328-43).

And the largest part of the 1975 convention was devoted to reports, debates and voting on contract bargaining, grievance handling, and employee wage and benefit issues. One of the first events of the convention was a report on national negotiations, including progress on wages, retirement benefits, the health and welfare plan, cost of living increases, job stabilization, and grievance handling (CR 155 Ex. S, pp. 14-19). The convention

spent hours on: employee retirement problems (e.g., 149-58); interest on back pay due as a result of national wage contracts or agreement violations (160-61); stabilization of employment, longevity pay, shift differentials, holiday pay, sick leave, bereavement pay, retention of seniority, strike ballots (161-69, 246-58); employee passes on buses, railroads and airlines, as well as birthday-holidays and flexitime arrangements (350-76); employer mutual aid pacts, protection for employees in airline mergers, cost of living increases in retirement benefits (321-25); strikes (319-21); and ratification of nationally negotiated collective agreements (399-405). Such deliberations over working conditions and contract provisions are at the core of the collective bargaining process, and are the central reason why local unions affiliate with national bodies to promote the common interest in improved wages and working conditions.

In sum, the Union's convention considers direct collective bargaining matters and the governance and maintenance of the bargaining entity itself. Petitioners' sole dispute with that description of the convention activity is that the "convention minutes reveal heavy emphasis upon political, ideological, and social activities and programs" (Pet. Br. 21). That "heavy emphasis" consists of: a total of ten speeches by public officials of both parties, the Mayor of Washington, D.C. (the host city), the President of the AFL-CIO (with which BRAC was and is affiliated) and the director of the AFL-CIO Committee on Political Education; and, since the Union is engaged in "lobbying activities", the few reports and resolutions adopted so that future legislative activities would represent the democratic will of the membership.[16]

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[16] While the apperances of the Mayor of Washington and the other public officials created no additional costs to BRAC, if there had been such costs, for example if any of these speakers had received an honorarium, those costs would have been deducted from objecting employees' dues under the Union's internal system.

Petitioners nonetheless assert that the "convention had little or nothing to do with collective bargaining with Western Airlines. Substantial convention activity was devoted to intra-union politics, disputes and fiscal management" (Pet. Br. 21). The second sentence of the foregoing does not support the assertion in the first sentence; rather, the second refutes the first. These activities are indispensable to the ability of this and any other union to carry on collective bargaining activities. Here, as elsewhere, petitioners simply fail to acknowledge that a union's "existence and activities" are inextricably interwoven.[17] The union negotiates and administers agreements through individuals who are its officers or employees and who are effectuating its democratically established policies. The expenditures attendant on the choosing of the union's officers and the formulation of these policies are an indispensable precondition of the entire process.

(b) Grand Lodge Litigation

In concluding that all the Grand Lodge litigation expenses are chargeable to the objectors, the court of appeals found:

> Paragraph 22 exempts the vast majority of the union's litigation expenditures from protesting employees' dues obligations. While the exempted cases did not pertain to any specific collective bargaining agreement or grievance, they did involve such things as: the union's challenge to the legality of the airline industry's Mutual Aid Pact, under which a struck carrier receives substantial financial assistance from non-struck carriers; the protection of employees' rights during bankruptcy proceedings involving an employer; the doctrine of fair representation; and the defense of suits alleging violation of the non-discrimination requirements of Title VII. [Pet. App. 12a]

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[17] The phrase is that of George Harrison quoted in *Street*, 367 U.S. at 761 and set forth at pp. 14-15 *supra*.

Petitioners object that this litigation did not involve Western Airlines (Pet. Br. 23), but, contrary to their contention, there is nothing in *Street*, *Allen* or *Abood* limiting chargeable expenditures to a particular employer-employee relationship. Indeed, the litigation expense category illustrates the irrationality and unworkability of that portion of petitioners' theory. Litigation concerning the legality of the Airlines Mutual Air Pact, which affected the Union's bargaining strength vis-a-vis *all* air carriers potentially benefitted Western Airlines employees to the same extent whether BRAC represented the employees of no other airline or of dozens. Thus, on any sensible approach, the full cost of that litigation would properly have been attributed to Western Airlines employees. However, due to BRAC's size, the cost of the litigation was a considerably smaller percentage of those employees' dues than if BRAC represented only the employees of Western, and a yet smaller proportion because of the dues paid by *railroad* employees. The latter potentially benefitted because of the impact on BRAC's bargaining strength as an organization, but they would not have been chargeable therefor under petitioners' proposed legal standard.[18]

It is relatively rare that labor litigation has consequences for this train or this air line only. More fundamentally, petitioners' argument is inconsistent with the nature of collective bargaining by national unions in which the combined strength of the group increases the bargaining power of all. Petitioners' effort to carve out Western Airlines as a separate island for financial purposes is wholly inconsistent with this philosophy—which as we have shown was Congress' philosophy embodied in

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[18] To cite another example the bankruptcy proceedings in which BRAC participated—though fortunately for Western Airlines employees not involving that carrier—could have established legal rules ultimately affecting Western Airlines employees. Compare *National Labor Relations Board v. Bildisco & Bildisco, etc.*, Nos. 82-818 and 82-852, argued October 11, 1983.

the RLA—and gives no weight to the benefit the petitioners derive from membership in a national union.

(c) Grand Lodge Publications

In concluding that the cost of Grand Lodge publications is an expense chargeable to objecting employees the court of appeals said:

> The monthly magazine of the Grand Lodge is the union's primary means of communicating information concerning collective bargaining, contract administration, and employees' rights to employees represented by BRAC. * * * While the magazine also includes general and recreational materials to make it more readable, that fact does not detract from the publication's value in the collective bargaining process. It would be extremely difficult for a union to represent employees without an effective means of communication. [Pet. App. 12a]

According to petitioners: "A cursory review of the *Railway Clerk/interchange* magazine reveals that the predominant purpose of this publication is not to convey collective bargaining information, but to promulgate BRAC's political, ideological, and fraternal cause." (Pet. Br. 22). Petitioners' review is indeed "cursory" because as the court of appeals concluded, and as we document in a footnote, the principal focus of the magazine is unquestionably on straight collective bargaining activities; it is the place for reporting such significant events as the initiation and outcome of negotiations and for educating employees on collective bargaining.[19]

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[19] Thus, issues of the *Railway Clerk/interchange* in the record include explanations of specific contract demands in national negotiations (e.g., CR 155 Ex. K, p. 4; Ex. N, p. 2); announcement of deadlock in negotiations and appointment of a federal mediator (CR 155 Ex. M, pp. 2, 6); news of a strike ballot and an explanation of issues involved in the potential strike (CR 155 Ex. N, pp. 2, 4); announcement of the outcome of a strike vote and appointment of a Presidential fact-finding board (CR 155 Ex. O, pp. 2, 4); and successful conclusion of negotiations (CR 155 Ex. Q, pp. 4-5). Significant events for individual system boards and locals are also

The district court did not find to the contrary, but instead excluded the cost of the publication *in toto* on the belief that no dues money of an objecting employee may be expended for "Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons" (Pet. App. 22a). That court did not explain why objectors should not be required to pay for the costs of publishing materials concerning collective bargaining, even if coverage of other subjects is "substantial"—a critical term that the district court neither defined, nor explicated in terms of this record. In any event, it is too simplistic to regard these other materials as unrelated to the basic function of the publication; for as the court of appeals recognized, these materials make the magazine more readable. The publication's educational value would likely be wasted if the magazine were as forbiddingly dry as the district court would make it. And no explanation has been provided as to why a court should, under the RLA or the First Amendment, substitute the court's own editorial judgment of what a union publication should contain in order to fulfill its function of communicating with its readers concerning that union's collective bargaining, for the union's judgment. Finally it is left equally obscure why it is not sufficient that insofar as the publication contains political and legislative material, under the Union's internal system, the cost of that material is *not* chargeable to objecting employees (A. 436, ¶¶ f, i). Petitioners rely on the existence of such material, but fail to acknowledge that they are not charged therefor.

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reported, particularly newly negotiated contracts and their major terms; for example, pacts with Western Airlines (CR 155 Ex. Q, pp. 8-9) and other employers (CR 155, Ex. L., p. 11, Ex. O, pp. 10-11, Ex. P., p. 7). Another area occupying considerable space is information related to contract administration; readers are advised in every issue on common questions about subjects such as unemployment benefits, sick benefits, annuity rights, and health insurance (e.g., CR 155 Ex. H, pp. 26-27; Ex. I, p. 26; Ex. Q, P. 4).

Petitioners also object to the magazine's references to BRAC endorsed boycotts, describing those references as "an ideological commitment" (Pet. Br. 22). While the cost of this portion of any issue of the magazine is undoubtedly *de minimis*, the point of principle is not insignificant. In supporting such a boycott BRAC either is furthering its own collective bargaining dispute with an employer, or is making common cause with other labor organizations. In the latter situation the Union fosters alliances with the labor movement generally: Even on petitioners' own narrow terms, BRAC thereby achieves a stronger position to call for a boycott by union members and sympathizers generally in the event of a strike against Western Airlines. In Judge Learned Hand's words:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.[20]

(d) Grand Lodge Social Activities

The district court ruled that all "recreational, social and entertainment expenses" other than those for activi-

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[20] *National Labor Rel. Bd.* v. *Peter C.K. Swiss Chocolate Co.*, 140 F.2d 503, 505-506 (C.A. 2). See also *General Electric Company*, 169 NLRB 1101, 1103-1104, enforced 411 F.2d 750 (C.A. 9), *cert. den.*, 396 U.S. 856.

ties attended by management personnel are not chargeable to objecting employees.[21] In rejecting that view the court of appeals said:

> The union purchases refreshments for business meetings and occasional social activities, which are open to non-member agency fee payers as well as union members. *Only minuscule amounts of money*—approximately .70 of one percent of Grand Lodge expenditures—*are involved.* These small expenditures are important to the union's members because they bring about harmonious working relationships, promote closer ties among employees, and create a more pleasant environment for union meetings. [Pet. App. 13a; emphasis added]

That petitioners pursue to this Court their resistance to paying a proportionate share of these minimal expenses (Pet. Br. 24-25) trivializes the First Amendment underpinnings of the *Street* doctrine. And their flat assertion that "labor organizations are fraternal associations; their secondary role is that of a bargaining representative" (Pet. Br. 24), is not only factually inaccurate but legally irrelevant. Of course labor organizations have historically been fraternal associations, but are such for a particular purpose: To represent workers in order to promote those workers' economic welfare. It is precisely because Congress is convinced that the economic importance of labor unions outweighs their fraternal aspects, that the internal affairs of unions have been subject to considerably more rigorous regulation than those of other fraternal associations. See, e.g., pp. 27-28, *supra.*

(e) Grand Lodge Death Benefits

Petitioners assert that "The non-chargeability of such fraternal benefit programs [as death benefits] has been clear since this Court's decisions in *Street* and *Allen.*" (Pet. Br. 19). This exemplifies their irresponsible use of

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[21] The question whether the cost for such activities may constitutionally be charged to objecting public employees was reserved in *Abood*, 431 U.S. at 236, n.33.

those precedents. *Street* did not reach the question of whether expenditures for death benefits financed by union dues are chargeable to objectors (367 U.S. at 769-770 & n.18), and *Allen* did not go beyond *Street* in defining the category of expenditures not chargeable to objecting employees.

Addressing the issue as an original proposition, which it is, there are three reasons why petitioners' claim that they may not be charged for death benefits must fail. First, Congress plainly understood that dues paid under union security agreements would be used to finance union death benefit plans. See p. 17 *supra*. Second, not even petitioners contend that the First Amendment provides the basis for invalidating this use of union dues to provide all employees represented by the union a form of insurance benefit. Third, the court of appeals was correct in stating "insurance benefits are a mandatory subject of collective bargaining. If BRAC chooses to provide death benefits itself for all employees, rather than to seek such benefits from the employer, it is then in a better position to negotiate for additional benefits or higher wages." Pet. App. 13a; citation omitted. Although petitioners charge that this point is "absurd" (Pet. Br. 29), the court of appeals merely recognized the realities of collective bargaining as stated by this Court:

> Funding a pension program is a current cost of employing potential pension recipients, as are wages. The size of pension benefits is a subject of collective bargaining, and future benefits may be traded off against current compensation.[22]

(f) Grand Lodge Organizing

In deciding that organizing expenses are chargeable to objecting employees, the court of appeals recognized "Maxi-

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[22] *Alabama Power Company* v. *Davis*, 431 U.S. 581, 592-593, footnotes omitted. While the cost of pension programs is considerably greater than that of death benefits that difference is immaterial here.

mum organization of an industry benefits employees and units already organized" (Pet. App. 13). We elaborate on this proposition because it is on principle the most important of all the categories at issue in this case and because petitioners' position that they need not pay their share of organizing expenses betrays their misunderstanding of the nature of collective bargaining and their obstinate nonacceptance of *Hanson's* holding that § 2, Eleventh is constitutional.

This Court set forth the basic theory of collective bargaining, and emphasized that organizing is indispensable to make it effective. In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, Chief Justice Taft wrote:

> [Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. * * * The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle of labor between employer and employees as to the share or division between them of the joint product of labor and capital. *To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.* Therefore they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. [emphasis added]

This analysis was reaffirmed when the Court sustained the constitutionality of the original Railway Labor Act in *Texas & N.O.R. Co. v. Ry. Clerks*, 281 U.S. 548, 570:

> The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.[23]

The Court again recognized this economic imperative in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503:

> Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization.

See also *Mine Workers v. Pennington*, 381 U.S. 657, 666 and *Musicians Federation v. Carroll*, 391 U.S. 99, 106.

In sum, when petitioners seek to divorce collective bargaining from organizing they cavalierly disregard the accepted wisdom of more than sixty years of judicial decisions as well as the fact that they are the beneficiaries of the Union's past organizing efforts, without which the Union would not have come into being, and would not have become the representative empowered to negotiate and enforce the collective agreements covering the objecting employees. No such ignorance may be attributed to Congress.

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[23] See also *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 33 (sustaining the NLRA's constitutionality) and *Labor Board v. Drivers Local Union*, 362 U.S. 274, 279.

American Steel Foundries and *Texas & N.O.R. Co.* had already been decided when Congress in 1934 amended the RLA to strengthen the position of the national railroad unions and when in 1951 that purpose was taken a step further through § 2, Eleventh. See pp. 18-19, *supra*. There is, of course, nothing in the legislative history of the 1951 amendments to the RLA supporting the contention that Congress intended to foreclose the use of union shop dues in organizing. And while the First Amendment, like the Fourteenth, enacts no particular economic theory, neither requires that Congress or this Court not see what "[a]ll others can see and understand." Cf. *Child Labor Tax Case*, 259 U.S. 20, 37.[24]

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[24] Petitioners' position that organizing expenses are not chargeable to them as a cost of collective bargaining is, as we have just shown, wholly inconsistent with the prevailing understanding when Congress enacted § 2, Eleventh. No more is necessary to refute petitioners' claim. But if the unity of collective bargaining and organization is one requiring evidentiary proof, it is abundantly present on this record.

Former Secretary of Labor Willard Wirtz emphasized in an affidavit in this case:

> One of the strongest impulses to national union organizations stems from the situation of the unionized employers who compete with the unorganized employers. No meaningful economic improvement is possible, and union representation itself is jeopardized, if substantial numbers of lower-paid workers remain employed in the industry. Indeed, the original impulse to organize national unions arose from the widening of product markets. A classic description of this process was given in 1909 by John R. Commons in "American Shoemakers, 1648-1895: A Sketch of Industrial Evolution" (Quarterly Journal of Economics, November, 1909, pp. 39-84) . . . [A. 227-228; see also A. 203-209 (Prof. Lloyd Ulman)]

In addition to reducing or eliminating the effects of job competition from successful unorganized employers, organizing clearly enhances a union's ability to conduct negotiations and administer grievances. The negotiation of collective bargaining agreements is cyclical. Some staff—for example, economists, actuaries, and lawyers specializing in negotiations—may not be required at all except during peaks in the bargaining cycle. However, hiring and retraining costs may make it impossible to adjust the size of the

(g) The "Western Airlines" Limitation

A running theme of petitioners' brief is that they may be required to support only "the statutorily required collective bargaining activities *with Western Airlines.*" Pet. Br. 15. We have already demonstrated some of the incongruities of this restriction and now show briefly that petitioners' theory is wholly without statutory or constitutional foundation.

As to the latter, it should suffice to reiterate that *Hanson* sustained the constitutionality of a statute that requires employees to pay dues to *national* unions. And, it is readily shown that petitioners' statutory argument cannot be reconciled with Congress' special concern for the financial needs of such national unions.

These complex institutions' costs must be met yearly whether or not in that year negotiations of a new contract are conducted with any given employer, yet all represented employees benefit by having that institutional structure in place when negotiations with *their* employer do occur. So too, one of the major purposes of workers joining in national unions is to pool the collective strength of as

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staff in response to cyclical variations. Consequently, a union which cannot shift such specialized resources from one collective bargaining crisis to another may be forced to choose between limiting these services and maintaining what economists call "excess" capacity. Thus, organizing also permits a union to spread both fixed costs and excess capacity over more members, *decreasing* the average cost per member in the original unit and/or *increasing* the support services available to benefit each member in the bargaining process.

Organization is necessary also to protect the organized workers against the loss of work by subcontracting to unorganized employers (see A. 247-51) and against the loss of representation rights if their employer is taken over by a larger unorganized employer, as occurred with devastating consequences to BRAC members when the organized Capitol Airlines was merged into United Airlines (CR 155 at 55 n.30). See *Brotherhood of Railway S.S. Clerks v. United Airlines*, 325 F.2d 576 (C.A. 6), cert. dismissed, 379 U.S. 26.)

many as possible to achieve their bargaining goals. See pp. 36 to 39, *supra*. The employees of Western Airlines (for example) are strengthened in their negotiations with that employer by the availability of strike support funds collected from *all* the members of the union, not just those employed by Western. Furthermore, as we have seen, the 1951 Congress' model of collective bargaining was industrywide bargaining in the railroad industry. It would be wholly artificial, if not impossible, to carve out from the cost of bargaining with all the railroads the costs of bargaining with any individual railroad involved in those negotiations.[25]

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[25] It is irrelevant in this connection that the statutory bargaining duty involves a "particular employer-union relationship" (Pet. Br. 15)—which, however, may involve several or many employers in joint negotiations. For, as we have shown at length, a union's *costs* of bargaining are not so confined, and under § 2, Eleventh a union is entitled at the least to receive from objecting employees their share of the costs of bargaining. And while the duty of fair representation and § 2, Eleventh have a common source in the union's status as exclusive bargaining representative, and the legislative history shows that the union's duty to serve all employees in the craft or class was one of the considerations underlying § 2, Eleventh, there is no merit to the suggestion (Pet. Br. 15) that chargeable expenses and the duty are congruent in scope. The duty of fair representation was fashioned by this Court to protect individual employees whom federal law has deprived of the "power to order his own relations with his employer" (*NLRB v. Allis-Chalmers*, 388 U.S. 175, 180); the cases at Pet. Br. 15 therefore correctly decided that the duty extends only to unfair conduct by a union in negotiating or administering agreements. The purposes of § 2, Eleventh need not be reiterated (see Part I of the Argument, *supra*); these purposes would be frustrated, as *Street* and *Allen* hold, if the dissenters were to pay less than their proportionate share of the costs incurred in fulfilling the union's statutory role. Thus, for example, while the costs of electing a national union official are a cost of collective bargaining (see pp. 27-28, & 30, *supra*), the conduct of such elections is obviously not subject to the duty of fair representation. Indeed, the entirely different statutory protection which Congress has provided in Title IV of the LMRDA (though also having its source in the union's power as bargaining representative) runs in favor of members only, in sharp contrast to the duty of fair representation.

III. PETITIONERS' CONTENTION THAT THE COURTS BELOW APPLIED AN INCORRECT STANDARD OF PROOF IS WITHOUT MERIT

As the Court recently observed: "In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence." *Herman & MacLean v. Huddleston*, —— U.S. ——, 51 L.W. 4099, 4103 (January 24, 1983), hereafter "*Huddleston*".[26] In this case, however, defendants accepted the burden of proving by a preponderance of the evidence the proportion of the union budget expended on ¶ 22 items—that is, those which the district court had previously ruled were not chargeable to petitioners, and which were not subject to BRAC's internal system. See pp. 3-4, *supra*. It was on this basis that the district court made findings which resulted in its determination of the proportion of dues payable to petitioners under ¶ 22. While the placing of the burden of persuasion on defendants rather than on plaintiffs is, we believe, unnecessarily generous to the latter, that issue, though important for future cases is not present here.[27] Rather petitioners contend that defend-

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[26] See also, *e.g.*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 256 ("*Burdine*"); *U.S. Postal Service v. Aikens*, —— U.S. ——, 51 L.W. 4354, 4356 (Apr. 4, 1983).

[27] The question turns on the meaning of the following sentence in *Allen*:

> Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, *bear the burden* of proving such proportion. [373 U.S. at 122, emphasis added]

The issue is whether the "burden of proof" refers to the burden of coming forward with evidence or encompasses also the burden of persuasion. Since the rationale of *Allen* was the union's superior access to evidence, the interpretation more consistent with accepted legal principles is that the union bears only the burden of coming forward. The analysis is most fully developed in *Burdine*, 450 U.S. at 252-256.

ants should be required to prove chargeable costs by "clear and convincing evidence", a contention they join with the assertion—wholly unsupported by any findings in the lower courts—that BRAC's accounting records do not provide such evidence. We shall first address the standard of proof issue and then the accounting issue.

(a) A "standard of proof 'serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.' [The Court has] required proof by clear and convincing evidence where particularly important individual interests or rights are at stake." *Huddleston*, 51 L.W. at 4103, citations omitted. But that principle is inapplicable here, because as the Court determined in *Street*, *Allen* and *Abood* the First Amendment rights of the nonobjectors as well as those of the objectors must be considered in determining the dues obligations of each. See pp. 24-25, *supra*.[28] Accordingly, the relevant principle, also stated in *Huddleston*, is:

> A preponderance-of-the-evidence standard allows both parties to "share the risk of error in roughly equal fashion." *Addington* v. *Texas*, 441 U.S. 418 at 423. Any other standard expresses a preference for one side's interests. [51 L.W. at 4103]

Since the First Amendment interests of the majority and the dissenters are of equal importance no preference for

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[28] This analysis parallels the remedial analysis of *Street* and its progeny. The remedies in those cases were designed to effectuate a "reconciliation between the majority and dissenting interests" (*Street*, 367 U.S. at 773) whereby the union members who wished to engage in political speech through their union must bear the entirety of that expense, but may not on that account be required to bear in addition a portion of the dissentors' share of other expenses. If, in determining the proportion of political (or other nonchargeable) expenditures to the union's total budget a "clear and convincing evidence" burden were imposed on the defendant union, there would be a greater risk that the nonobjectors would have to pay a share of those costs properly chargeable to the objectors.

either is permissible and the "balance of interests in this case warrants use of the preponderance standard." *Id.*

While we believe the foregoing is dispositive, it is also true that even where a "transcendent" First Amendment interest is only on one side, none of this Court's decisions cited at Pet. Br. 29-31 declare a "clear and convincing evidence" standard of proof for establishing the facts.[29] Several of those cases decided the pure issue of law whether claimed First Amendment rights are outweighed by other interests.[30] Questions of the standard of proof were addressed only in *Speiser v. Randall*, 357 U.S. 513, *Freedman v. Maryland*, 380 U.S. 51 and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546. We unhesitatingly accept those precedents, but they do not aid petitioners. In each the Court prescribed the standards for performing a uniquely sensitive task—not remotely involved here—of ascertaining "the line between speech constitutionally guaranteed and speech which may legiti-

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[29] Petitioners have advisedly abandoned their reliance (Pet. for Cert. 18-19), on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323. *Gertz* did articulate the requirement that in defamation actions plaintiffs who are *public* officers or *public* figures must establish malice by "clear and convincing proof". 418 U.S. at 342. However, disagreeing with the plurality opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29, the *Gertz* Court ruled that *private* individuals suing for defamation need not establish by clear and convincing evidence that the defamatory statement was made with knowledge of its falsity or in reckless disregard for the truth. 418 U.S. at 345-346. The Court did so while holding that defamation suits by private individuals *are* subject to the "constitutional commands of the First Amendment" (*id.* at 349) and imposing other limitations on such suits (*id.* at 347-350). Thus *Gertz* demonstrates that "clear and convincing proof" is not a general requirement in First Amendment litigation, but is an element of the constitutional standard declared in *New York Times Co. v. Sullivan*, 376 U.S. 254. The ruling of the Master in *Beck v. CWA*, 112 LRRM 3069, 3073 (D. Md.) (Pet. Br. 29) was mistakenly based on the plurality opinion in *Rosenbloom*.

[30] That balance has already been struck for this case by *Hanson* and *Abood*, *see* pp. 8-9, 22-24, *supra*.

mately be regulated, suppressed, or punished [, a line which] is finely drawn." *Speiser*, 357 U.S. at 525; see also *Freedman*, 380 U.S. at 58; *Southeastern Promotions*, 420 U.S. at 559-560. Even in those cases the Court held only that the burden of proof rests with the party that seeks to suppress speech; none required that this burden be met by "clear and convincing evidence".[31] This is especially harmful to petitioners' argument, because *Freedman* and *Southeastern Promotions* involved prior restraints, which are strongly disfavored, but to which petitioners are not subject.[32]

Indeed, petitioners' thesis that a party asserting a First Amendment right is entitled to require that the opponent's case be established by clear and convincing evidence is squarely refuted by *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274. That case involved the respective burdens of a public employee who claims that he has been penalized for engaging in conduct protected by the First Amendment and those of his public employer. The Court summarized its holdings as follows:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was con-

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[31] Because both the majority and the dissenters have equal First Amendment rights, these cases do not bear on the allocation of the burden of proof, the issue put aside at p. 42, n.27, *supra*.

[32] Petitioners are not being prevented from speaking or associating with whomever they please. They are required to pay money, some portion of which is being used for purposes to which they arguably cannot be required to contribute. "Historians may find hyperbole" (cf. *Jones v. SEC*, 298 U.S. 1, 33 (Cardozo, J., dissenting)) in the petitioners' suggestion that they would be subjected to prior restraint such as brought forth Milton's *Aeropagitica*, and the judgments in cases like *Near v. Minnesota*, 283 U.S. 697, and *New York Times v. United States*, 403 U.S. 713, even if the judgment below left BRAC free to collect the full dues from petitioners and to reimburse them after a calculation of the amount which the unions may not retain. In any event, the district court's judgment protects petitioners against having to pay whatever proportion of their dues is not properly chargeable. See pp. 9-11, *supra*.

> stitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [429 U.S. at 287, footnote omitted]

That decision is contrary to petitioners' present contention in two respects: First, an employee who has proven that he had exercised a First Amendment right nevertheless bears also the burden of proving that this conduct was a motivating factor for the employer's adverse action. Thus, there is no general rule that the burden of proof may not be imposed on the party whose First Amendment rights are at stake. Second, even where the employee has met the burden, the employer may yet prevail if he establishes by a *preponderance of the evidence* the defense that the adverse action would have been taken even in the absence of the protected conduct. Accord: *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416. If petitioners' theory were correct, only clear and convincing evidence would be sufficient.

(b) As noted previously, petitioners are not content to impose a "clear and convincing evidence" standard of proof on the defendants but insist that their standard is satisfied only by what they describe as "records maintained in accordance with generally accepted accounting principles" (Pet. Br. 27). Since as we have just shown, petitioners' standard-of-proof argument is without merit, its accounting corollary also fails.[33] We nevertheless feel

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[33] Petitioners say "BRAC admittedly owed plaintiffs 'a fiduciary obligation not to misspend dues receipts . . .'" (Pet. Br. 27). Defendants have never conceded, and dispute, that they owe a fiduciary duty to objecting employees as such; those employees are owed only whatever statutory duties are declared by § 2 Eleventh of the RLA. In the sentence from a BRAC brief, of which petitioners

called upon to respond to petitioners' arguments concerning accounting, because these arguments contain gross distortions of the record, and culminate in an ill-concealed attack on what this Court decided in *Allen*, a matter of intense practical importance.

i. Petitioners' repeated assertion that BRAC's accounting records do not satisfy generally accepted accounting principles is contrary to the findings of the district court. That court after a lengthy trial, which focused on those records and testimony concerning them,[34] accepted this evidence as establishing the percentage of BRAC's total expenditures which was attributable to categories not chargeable to petitioners under ¶ 22 of that court's earlier ruling. See pp. 3-5, *supra*. Petitioners' "accounting standards" objection to those findings misunderstand the judicial function. Although the Union's

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quote a fragment, the Union was referring to its fiduciary obligation, under 29 U.S.C. § 501(a), to all the members of the Union *as a group*. (Indeed, since the *Ellis* plaintiffs are nonmembers, this fiduciary obligation does not apply to them at all.) There is nothing in § 501(a) which requires any particular form of accounting records, and there is no claim in this case that the defendants have not fully complied with the financial reporting and disclosure requirements of 29 U.S.C. §§ 431 *et seq.* Petitioners' further references are to the pleadings, wherein BRAC *admitted* that it is subject to a "fiduciary" duty of fair representation, but *denied* the allegations that this duty was breached by BRAC's uses of dues. In their petition for certiorari and their brief on the merits petitioners have relied exclusively on § 2 Eleventh of the RLA and the First Amendment.

[34] Defendants' witnesses produced innumerable payment vouchers, audits and other documents (CR 291 Ex. F-M, AF-AM, AP-AW, BB-BM, BT-BZ). They described in great detail the work of individual units and subdivisions of the Union (RT 15-64, 165-231, 314-53, 371-89, 428-64, 488-517, 591-648, 718-33, 774-800, 883-909). They testified to the amounts of time spent by them and their subordinates on various functions (e.g., RT 28-64, 171-88), testimony confirmed by examination of their daily schedules, correspondence, telephone calls (e.g., RT 29-30, 884, 892-93, 897-98).

books do not group its records along ¶ 22 lines, *there are records for every Union disbursement.* In receiving those records and the supporting testimony the trial court determined damages by the traditional judicial process. Plaintiffs were at liberty to cross-examine or attempt to contradict defendants' evidence, and their plea that this traditional process is inadequate to determine Union expenditures finds no support in logic, in law, or in experience. Moreover, the court of appeals unanimously affirmed the district court's ruling on the accounting issue. Pet. App. 7a-8a, 14a. Petitioners' one-sided description of the evidence (Pet. Br. 27-29) cannot remotely satisfy its heavy burden under the "two-court rule" in asking this Court to overturn the finding that these records were sufficient to support the district court's conclusions concerning the proportion of ¶ 22 expenditures. See, *e.g.*, *United States v. Reliable Transfer Co.*, 421 U.S. 397, n.2 and cases cited.[35]

In the end, petitioners' criticism of BRAC's accounting methods is seen to be an ill-disguised effort to secure the overruling of what the Court decided in *Allen* with respect to accounting:

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[35] In a desperate effort to buttress their attack on BRAC's accounting system petitioners charge that the Grand Lodge and AFL-CIO COPE "colloborated to 'launder' $100,000, illegally channeling funds of union members and agency fee payors into the campaigns of political candidates endorsed by the AFL-CIO." (Pet. Br. 27). The evidence cited by plaintiffs shows that the transactions to which petitioners refer worked a result opposite to what petitioners allege: BRAC gave up political money voluntarily donated to its separate segregated fund (See *FEC v. National Right to Work Committee*, —— U.S. ——, 51 L.W. 4037, 4038 (Dec. 13, 1982)), and received union treasury money whose use is politically restricted and covered by BRAC's political rebate plan. Contrary to Pet. Br. 27, their accountant's "analysis" has been "refuted" four times previously (A. 254, 363, RT October 23, 1979 at 1326-27, A. 400). Moreover, the "documentation" on which that analysis rests was excluded by the district court (RT Aug. 11, 1978 at 1250-51), a ruling petitioners have never challenged but have simply ignored in three courts.

> Absolute precision in the calculation of such proportion [of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. [373 U.S. at 122][36]

Petitioners assert that *Allen* "has been misinterpreted as having condoned whatever accounting practices a union finds convenient." Pet. Br. 31.

As we have shown, this cavalier criticism of the courts below is entirely unjustified. Petitioners have failed to identify even a single error in the voluminous books and records introduced and relied upon by BRAC at the trial. And the courts below were entirely correct in rejecting petitioners' position, reiterated here, that BRAC should have kept its accounting records according to categories of expenditures whose possible legal relevance did not even appear until the district court made its ¶ 22 ruling, and which will prove to be irrelevant if the judgment of the court of appeals reversing the district court's ¶ 22 ruling is affirmed. *Allen* makes this plain. The Court there reaffirmed *Street*'s holding that political expenditures are not chargeable to objecting employees, and directly confronted questions of proof and accounting as those questions bear on the relief to which objectors are entitled, and the Court did *not* determine that the plaintiffs were entitled to an order requiring the defendant unions henceforth to treat political expenditures separately in their accounts. Thus, *Allen* leaves no room for petitioners' contention that the proportion of chargeable expenditures can only be proven by accounting records that anticipate this Court's determinations of what expenditures are not chargeable to objecting employees.

Petitioners, for good reason, are careful not to articulate the consequence of their position. Since the rec-

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[36] *Allen* thus comports with the common sense of cost accounting: "Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Colorado Interstate Co. v. Comm'n*, 324 U.S. 581, 589.

ords upon which petitioners insist do not exist, under their rule of law, the Union would be disabled from proving what proportion, if any, the challenged expenditures bore to its total budget. By creating this artificial requirement as to the nature of the evidence a union must produce, petitioners would render the union's burden under *Allen* insuperable, with the result that the objecting employees would recover their entire dues. *And this would follow even if only a single one of the expenditure categories at issue here were determined to be non-chargeable.* This of course is irreconcilable with *Allen*.[37]

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[37] Petitioners well understand this to be the consequence of their position. For example, they now say that they "do not contend that all expenses of BRAC conventions are non-chargeable" but "do contend that they can be charged only their proportionate share of convention costs which are proven to be directly related to collective bargaining with Western Airlines" (Pet. Br. 20). They say further that "BRAC did not meet its burden of establishing Western Airlines collective bargaining costs [at the convention]" (Pet. Br. 22), by which they mean, as the burden of proof portion of their brief shows, that BRAC did not produce "accounting records which isolate the costs of collective bargaining with Western Airlines" (Pet. Br. 27). This would, of course, be an impossible task. How, for example, would accounting records allocate the costs of electing union officers to each of the employers with which BRAC bargains?

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No. 82-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Respondents.

ALLEN L. FAILS, et al.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ARGUMENT

I. The Right To Be Free From Coerced Union Speech And Association Is A Fundamental First Amendment Right Entitled To Full Constitutional Protection

Respondent Railway Clerks ("BRAC") say little on the substantive constitutional questions in this case. BRAC merely argues that, as a matter of legislative history, all of the union activities at issue here are "germane" to collective bargaining, and that *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956), has settled that the plaintiff employees constitutionally may be charged for these activities. Res. Br. at 11-25.[1] *Hanson* cannot be read so broadly.

All that *Hanson* held was that Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1976), in authorizing agreements conditioning employment on payment of union fees, was constitutional *on its face*. *Machinists* v. *Street*, 367 U.S. 740, 746-49 (1961); *see Hanson*, 351 U.S. at 235-38 & nn. 7-8. Because of the nature of the case records, in *Hanson* and in each of the three subsequent challenges to union spending practices to reach the Court, no attempt was made to demarcate exactly the types of expenditures which are lawfully chargeable to dissenters. The Court specifically reserved the question of whether non-political union activities, such as death benefit funds and social activities, are among the purposes for which compelled fees lawfully may be expended. *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 236-37 & n.33 (1977); *Railway Clerks* v. *Allen*, 373 U.S. 113, 121 (1963); *Street*, 367 U.S. at 768-70 & n.18.

Abood characterized "the difficult line-drawing questions" left open by it and its precursors as "constitutional questions." 431 U.S. at 236-37 & n.34. Under the Railway Labor Act, the task is first to determine whether each

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[1] "Res. Br." refers to the Brief for Respondents; "AFL-CIO Br." and "NEA Br.," the respective briefs for the American Federation of Labor-Congress of Industrial Organizations and National Education Association as *amici* in support of respondents; "Pet. Br.," the Brief for Petitioners. References to appendices and the record are as explained in Pet. Br. at 1 n.1.

category of union expenditures is one for which the statute permits the use of compulsory dues. If it is not, the inquiry ends there. But if the activity is one for which the Act permits coerced fees to be used, then the Court must determine whether that type of compulsory subsidization is countenanced by the first amendment. The answer to the first question does not automatically answer the second, as BRAC pretends.

BRAC's affiliate, the American Federation of Labor and Congress of Industrial Organizations, advances the constitutional arguments not made by BRAC. Ignoring decades of first amendment precedent, *amicus* AFL-CIO urges that an employee's right to be free from coerced participation in union speech and association is an attenuated right entitled only to limited protection.

First, the AFL-CIO asserts that the first amendment protects the right *not* to speak and associate to a lesser degree than it protects the right *to* speak and associate. AFL-CIO Br. at 4, 14-20. However, the amendment protects explicitly "the *freedom* of speech" and implicitly "the *freedom* of an individual to associate for the purpose of advancing beliefs and ideas." U.S. Const. amend. I (emphasis added); *Abood*, 431 U.S. at 233 (emphasis added). Neither speech nor association is free when it is compelled, any more than either is free when suppressed. The freedoms guaranteed by the Constitution include "both the right to speak freely and the right to refrain from speaking at all," *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and "[t]he right to belong—or not to belong," *Lathrop* v. *Donohue*, 367 U.S. 820, 881-82 (1961) (Douglas, J., dissenting).[2]

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[2] The right is one of refraining from speaking or belonging *at all*, as well as one of speaking or associating as one wishes. *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), are not distinguishable on a "negative" versus "affirmative" right basis. The essence of the constitutional violation in the case of a patronage dismissal is not that the employees are discharged because they support another political party, but that they are discharged for *not* affiliating with the party in power. *Branti*, 445 U.S. at 517.

A corollary of these "concomitant" and "complementary" rights, *Wooley*, 430 U.S. at 714, is the principle that state action requiring speech or association is as much a "restraint" as governmental action preventing or restricting speech or association. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974); *see Elrod* v. *Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion). Neither type of restraint is less obnoxious because the persons restrained are otherwise free to speak and associate as they wish. *See Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 541 n.10 (1980); *Street*, 367 U.S. at 778 (Douglas, J., concurring).

Both aspects of the freedoms of speech and association are of equal dignity. The "lesser negative rights" theory was rejected in *Abood:* "The fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." 431 U.S. at 234. As Justice Douglas said, anticipating *Abood*, laws curtailing the right not to associate should be treated "like any that touch on First Amendment rights": "exceptional circumstances should be shown," and the law must "be 'narrowly drawn' so as to be confined to the precise evil within the competence of the legislature." *Lathrop*, 367 U.S. at 882 (dissenting opinion) (citation omitted). Indeed, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 633 (1943), suggests that the governmental interest required to justify compulsion of belief, speech, or association must be "even more immediate and urgent" than that necessary to sustain suppression of those freedoms.[3]

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[3] *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-88 (1980), does not change these principles. *See Consolidated Edison*, 447 U.S. at 552 & n.2 (Blackmun, J., dissenting); *Pruneyard*, 447 U.S. at 96-101 (Powell, J., concurring in part). The operative factor in *Pruneyard* was the specialized type of property involved: a shopping center which "by choice of its owner" had been opened "to the public at large." 447 U.S. at 87 (opinion of the Court), 90 (Marshall, J., concurring). Here, the personal funds of the employees are not public funds in any sense, and the union obtains

Second, the AFL-CIO contends, based primarily on an erroneous interpretation of *Buckley* v. *Valeo,* 424 U.S. 1 (1976), that the rights at stake here are attenuated because the only sense in which the plaintiffs are compelled to associate or speak is by the payment of a small sum of money to the union. AFL-CIO Br. at 4-5, 12-14 & n.9. However, *Buckley* emphasized that the dependence of the exercise of first amendment freedoms upon the expenditure of money does not "reduce the exacting scrutiny required by the First Amendment." 424 U.S. at 16. It held that "contribution and expenditure limitations both implicate fundamental First Amendment interests," and required the government to demonstrate that contribution limitations served "a sufficiently important interest" by "means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 23-29.

Moreover, the infringement on protected freedoms in this case is greater in kind than that involved in *Buckley.* At issue there was whether political speech and association could be restricted in amount or *volume.* At issue here is what activities constitutionally may be encompassed in a definition of "collective bargaining." This is not an issue of how much speech and association of any particular type may be compelled, but of the subjects on which *any* speech and association may be required—*i.e.,* of *content*—a question mandating strict scrutiny. *See, e.g., Carey* v. *Brown,* 447 U.S. 455, 460-63 & nn. 6 & 7 (1980). Cases such as *First National Bank* v. *Bellotti,* 435 U.S. 765 (1978), *Consolidated Edison,* and *Elrod,* in which a prohibition or compulsion of speech or association with regard to certain subjects was struck down, are closer analogs to this case than cases dealing with limitations.[4]

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those monies through compulsion. This is a "critical distinction." *First National Bank* v. *Bellotti,* 435 U.S. 765, 794 n.34 (1978). Moreover, unlike the property owner in *Pruneyard,* individual employees have no means of disavowing the union's views when it purports to speak for the employees for whom it is exclusive representative.

[4] *California Medical Ass'n* v. *FEC,* 453 U.S. 182 (1981), and *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976), are

Because "any assessment of [an employee's] salary is tantamount to coerced belief," *Elrod*, 427 U.S. at 355 (plurality opinion), the relative amount of money used by the union for the subjects in question in this case is irrelevant to whether Congress could have sanctioned assessments for those purposes. As *Abood* noted, quoting James Madison, the author of the first amendment, " 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' " 431 U.S. at 234 n.31; *see Elrod*, 427 U.S. at 359 n.13 (plurality opinion).

Third, the AFL-CIO theorizes that the interests at stake in assessing the constitutionality of government action in the form of a statute requiring an individual financially to support "beneficial" activities through a private organization are no greater than the minimal first amendment interests involved in a disbursement of tax dollars to a private entity. AFL-CIO Br. at 7-9, 11-12, 23-27. This analogy is rejected by the very cases that the AFL-CIO cites.

Regan v. *Taxation With Representation*, 103 S. Ct. 1997, 2001 & n.7 (1983), specifically distinguished a case in which Congress has subsidized private first amendment activity "out of public monies" from one in which an ordinance "regulated First Amendment activity by limiting individuals' expenditures of their own money on political speech." The Court recognized that " '[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law. . . .' " *Id.* at 2003. Similarly, *Buckley* observed that

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limitation cases. To the extent that the plurality in *California Medical Association* suggests that some infringements of first amendment rights can be sustained without strict scrutiny, it has been overruled by *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981). The latter case emphasized that "regulation of First Amendment rights is always subject to exacting judicial review." *Id.* at 294, 298; *see id.* at 302 (Blackmun, J., concurring in the judgment).

the use of public money to finance the campaigns of candidates for president "is like any other appropriation from the general revenue" and "involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree," citing the opinions of Justices Black and Douglas in *Lathrop* and *Street* that such compulsion would be unconstitutional. 424 U.S. at 91 & n.124.[5]

Fourth, the AFL-CIO argues that coercion to support the union activities at issue here is not subject to strict scrutiny because those activities are "purely social or purely economic," rather than "political" or "ideological," and "have no obvious connection to the communication of any ideas whatever." AFL-CIO Br. at 5-6, 9-11, 16 n.12, 27-30.

The AFL-CIO's argument was unequivocally rejected in *Abood:* "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." 431 U.S. at 231 & n.28. Because freedom of association is as fundamental as freedom of expression, *Buckley*, 424 U.S. at 25, this principle that the amendment's protection is "not confined to any field of human interest" applies equally to association. *Thomas* v. *Collins*, 323 U.S. 516, 530-31 (1945).

Admittedly, where speech is purely commercial, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 562-63 (1980),[6] or where the speech of a public employee "touche[s] upon matters of public concern in only a most limited sense" and "is most accurately

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[5] *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 103 S. Ct. 948 (1983), also is inapposite because it merely concerned a government subsidy, in the form of access to nonpublic government property.

[6] "Commercial speech" is "expression related solely to the economic interests of the speaker and its audience," *i.e.*, " 'speech proposing a commercial transaction.' " *Central Hudson Gas*, 447 U.S. at 561-62. If the communication concerns lawful activity and is not misleading, government regulation of even commercial speech must have more than just a rational basis to be permissible under the first amendment. *Id.* at 564-66.

characterized as an employee grievance concerning internal office policy," *Connick* v. *Myers*, 103 S. Ct. 1684, 1691-94 (1983),[7] the first amendment provides less protection than it does for other speech.

But, the only BRAC activities comparable to commercial speech, or speech primarily concerning internal employer-employee affairs that only incidentally involves matters of public concern, are those which it performs as exclusive bargaining agent for employees of Western Airlines. When BRAC negotiates an agreement for those employees, adjusts employee grievances against Western Airlines, or settles disputes over interpretation of the contract, it engages in speech which proposes a commercial transaction and directly relates to the economic interests of the employees for whom it speaks and the employer which is its audience. The first amendment impact of these activities is usually only limited and incidental. *Abood*, 431 U.S. at 221-23.

However, unions exist for more purposes than serving in the narrow role of exclusive representative in a particular bargaining unit. They also are voluntary associations formed " 'to do those things which the members authorize the union to do in their interest and on their behalf.' " *Retail Clerks, Local 1625* v. *Schermerhorn*, 373 U.S. 746, 753-54 & n.6 (1963). As Justice Frankfurter observed in *Street*, in this country and "particularly" in the railroad industry, labor unions are part of a "movement," embody a "philosophy," and engage in political activity—candidate support and lobbying—"indissolubly relating to the immediate economic and social concerns that are the *raison*

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[7] The holding of *Connick* is limited. When a public employee's speech does not implicate the government's interests as an employer of that employee, regardless of its subject matter, or when a public employee speaks upon matters of public concern which "only tangentially and insubstantially" involve the direct employer-employee relationship, then the employee's discharge must be scrutinized in the same manner as any state action infringing on a citizen's first amendment rights. 103 S. Ct. at 1695 & n.1 (Brennan, J., dissenting); *Pickering* v. *Board of Educ.*, 391 U.S. 563, 571-74 (1968); *see Branti*, 445 U.S. at 515-16.

d'être of unions." 367 U.S. at 798, 800-01, 805, 812-16 (dissenting opinion). In short, unions as *institutions* are pervasively ideological in nature. *See Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963, 965 n.5a (D.P.R. 1983) (discussing the definition of "ideological" and "political" as used in *Abood*).

When a union acts other than as a bargaining agent performing its statutory functions in a particular unit, its activities are not mere commercial speech and association. Speech and association concerning unions, pro and con, and labor relations "are not matters of mere local or private concern." Free discussion and association concerning such subjects is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," and fully protected by the first amendment. *Thornhill* v. *Alabama*, 310 U.S. 88, 102-05 (1940); *accord Thomas*, 323 U.S. at 530-32, 536-38; *see Mine Workers, District 12* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222-23 (1967).

Finally, the AFL-CIO suggests that, because the actual decisions to use funds for institutional purposes are made by union members "in accord with democratic procedures," not by the government, "the degree of governmental action, and therefore of constitutional infringement in this situation, is marginal at best." AFL-CIO Br. at 6-7, 20-22; *see* NEA Br. at 11-13.

That union decisions may be made democratically is constitutionally irrelevant. "The very purpose of the Bill of Rights was . . . to place [certain subjects] beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts." First amendment rights "may not be submitted to vote." *Barnette*, 319 U.S. at 638. Majority rule in union spending decisions does not protect minority rights: "By definition the protection of minority interests requires that the majority be restrained in exercising its will over the minority." *United States* v. *Boyle*, 482 F.2d 755, 763 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

Moreover, the union's decision itself is not the concern. In neither the Railway Labor Act nor Michigan's public

labor relations act did the legislature require the making of a compulsory unionism agreement or involve the government in the decisions as to how exacted funds are spent. Nonetheless, as to both statutes the Court found that the legislative authorization of the agreements and sanction of union use of the money exacted thereby, and judicial enforcement of the agreements, were governmental action requiring constitutional scrutiny. *Abood*, 431 U.S. at 232-33; *Hanson*, 351 U.S. at 232 & n.4; *see Street*, 367 U.S. at 746-50 (opinion of the Court), 777 & n.3 (Douglas, J., concurring), 789 & n.13 (Black, J., dissenting).

"[A] State normally can be held responsible for a private decision . . . when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). In *Hanson*, *Street*, and *Abood* the Court found that legislative authorization and potential judicial enforcement of union decisions to use coerced dues for political and ideological purposes would (*Hanson* and *Street*) and did (*Abood*) constitute the necessary significant encouragement or coercive power. Here, if the Railway Labor Act sanctions, and the courts enforce, BRAC's decisions to use the plaintiffs' compulsory dues for institutional purposes, then the federal government is responsible for those decisions.[8]

The degree of constitutional scrutiny of compulsory unionism agreements simply does not depend upon the directness of the governmental action present in a particular case:

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[8] Even if the Act is construed to prohibit expenditure of compulsory dues for institutional as well as political purposes, Congress' choice (or omission) of procedures to protect against prohibited expenditures requires constitutional scrutiny. "While private misuse of a . . . statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints," if the state action test is otherwise met in the particular "circumstances of the case." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 939, 941 (1982).

> Mr. Justice Douglas, the author of *Hanson*, expressly repudiated that suggestion:
> "Since neither Congress nor the state legislatures can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or indirectly." *Street*, 367 U.S., at 777 (concurring opinion).

Abood, 431 U.S. at 227 n.23.

II. Because Fundamental Rights Are At Stake, The Union Has A Heavy Burden In Establishing Both Permissible Expenditures And The Validity Of The Procedures By Which Employee Rights Purportedly Are Protected

Where fundamental first amendment freedoms are at stake, the party seeking to abridge those freedoms normally must assume the burdens of demonstrating a compelling governmental interest and of showing that the means utilized to serve that interest are as narrowly drawn as possible. *E.g., Consolidated Edison Co.*, 447 U.S. at 540. This BRAC does not deny. BRAC even "unhesitatingly accept[s]," Res. Br. at 44, precedents such as *Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958), which hold that where one party has a fundamental first amendment interest at stake, due process requires that the other party "bear the burden of persuasion" in drawing the fine "line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished." Nonetheless, BRAC argues that, because the plaintiffs' rights are balanced by equally important constitutional rights of its voluntary members, its burdens of proof in this case are not so heavy as those precedents imply. Res. Br. at 24-25, 43-44.

In fact, no constitutional rights of voluntary union members are affected by the determination of the obligations of dissenters. The Constitution does not guarantee workers the right to engage in collective bargaining. *Babbitt* v.

Farm Workers, 442 U.S. 289, 312-14 (1979). *A fortiori*, union members have no constitutional right to require other employees to contribute to the union's bargaining costs. The right to such compulsion has no basis higher than statute.

Neither does the majority have a constitutional right to the assistance of the state in making its political and institutional advocacy more effective through the use of dissenters' monies for bargaining purposes, thus freeing other union assets to be used for political and institutional purposes. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley*, 424 U.S. at 48-49. The right of workers to associate in unions and to advocate improvement in working conditions cannot be construed as a constitutional guarantee that other workers may be compelled to support that association and advocacy. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 529-31 (1949).

" '[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation.' " *Regan*, 103 S. Ct. at 2003. Congress has not required any union to be an exclusive representative. A union's *voluntary* decision to assume the privileges of that status carries with it the commensurate duty of fair representation. *Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192, 198-204 (1944). The performance of that duty has costs, but the members' interests in expending dues for political and institutional purposes have not, therefore, been burdened *by government*. The same is true of a union's *voluntary* assumption of the privilege of a union shop, which necessarily carries with it a commensurate fiduciary duty of accounting for the use of funds exacted from dissenters.

Thus, because there are fundamental first amendment interests at stake only on the plaintiffs' side, the union has a three-fold burden: (1) it must establish that each par-

ticular type of union expenditure sanctioned by the statute directly serves the governmental interest advanced by the union shop, *see Elrod*, 427 U.S. at 368 (plurality opinion); (2) even if the definition of permissible costs is drawn as narrowly as possible, the union must demonstrate that the procedures under the statute are adequate to prevent coerced subsidization of impermissible costs, *see Speiser*, 357 U.S. at 520-21; and, (3) the union must prove the actual proportion of permissible expenditures, both at trial and in any procedure selected to provide future protection for dissenters' rights, *see Abood*, 431 U.S. at 239 n.40. This is a burden of persuasion, not just of going forward with the evidence. *See Elrod*, 427 U.S. at 368 (plurality opinion); *Speiser*, 357 U.S. at 525-26.[9]

The issue of burden of proof also involves a question of the degree of proof required. BRAC concedes that " '[The Court has] required proof by clear and convincing evidence where particularly important individual interests or rights are at stake.' " Res. Br. at 43, quoting *Herman & MacLean* v. *Huddleston*, 103 S. Ct. 683, 691 (1983). Nonetheless, BRAC argues that the cases plaintiffs cite did not require the party seeking to abridge first amendment rights to provide clear and convincing evidence, and that *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), refutes plaintiffs' position. Res. Br. at 44-46.

But plaintiffs do not say that the clear and convincing evidence standard is appropriate in every case in which a party asserts first amendment rights, only that it is required for determinations which, if made erroneously against the individual, inevitably result in the abridgment of fundamental liberty. *Compare Abood*, 431 U.S. at 236-37,

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[9] BRAC suggests that *Allen's* "burden of proving" the proportions of expenditures, 373 U.S. at 122, refers only to the burden of producing evidence. Res. Br. at 42 n.27. However, BRAC cites neither cases in which first amendment interests were at stake, as in *Elrod* and *Speiser*, nor cases in which operative facts were peculiarly within the knowledge of one party, as in, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 512 F.2d 527, 538 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976).

with Speiser, 357 U.S. at 525-26. *Mt. Healthy* was not such a case. In *Mt. Healthy*, if the employee would have been discharged for employment-related reasons even in the absence of the protected conduct, there was no effect at all on first amendment rights; if the employee was discharged for the protected conduct, that conduct, as in *Connick*, *see* pp. 6-7 *supra*, only incidentally involved matters of public concern, and the effect on first amendment interests was limited. Here, if a union expenditure is related to collective bargaining, it has a limited impact upon first amendment rights, *Abood*, 431 U.S. at 222; *but*, if it is not so related, then it abridges fundamental liberty, *id.* at 233-36.

Speiser does not specifically hold that a clear and convincing evidence standard is among the "sensitive tools" required for the separation of fundamental freedoms from those not so carefully protected. It did not have to, because the procedure there did not even place the burden of persuasion on the correct party. But *Speiser's* comparison of that case to a criminal case, in which proof beyond a reasonable doubt is required, implies a need for more than a mere preponderance of the evidence where the "transcendent value" of speech and association is involved. 357 U.S. at 525-26. *Elrod* goes further. There it was held that the state had the burden of establishing that a particular employee occupied a policymaking position for which patronage was constitutionally permissible, "cases of doubt being resolved in favor of the particular [employee]." 427 U.S. at 368 (plurality opinion). By definition, a "preponderance of the evidence" does not remove doubt: "in the last analysis, [it] means probability of the truth." 30 Am. Jur. 2d *Evidence* § 1164 (1967). Given the basic freedoms at issue in this case, clear and convincing evidence must be required of the union so that instances of doubt are resolved in favor of the employees.

"Absolute precision in the calculation" of the proportion of permissible and impermissible expenditures is not required even under a clear and convincing evidence standard. *Allen*, 373 U.S. at 122. But *some* degree of precision clearly is necessary under any standard of proof, and here

it is appropriate to require BRAC to provide that degree of precision flowing from adherence to generally accepted accounting principles.

BRAC and *amicus* NEA complain that the use of accounting records which segregate permissible costs would be unduly burdensome. Res. Br. at 49-50; NEA Br. at 6-10. "[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of [individual constitutional rights]." *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 646-47 (1974).[10] Moreover, as noted in another context, it "is not unduly burdensome" to require an organization receiving a governmental benefit, because it engages in one type of activity, to segregate its funds and keep records adequate to show that contributions received for that purpose are not used to pay for another category of activity. *Regan*, 103 S. Ct. at 2000 n.6. No less should be required of unions which seek the privilege of coercing bargaining fees from employees.

III. A Union-Administered Dues Reduction Scheme Inherently Does Not Provide Due Process Or Prevent Coerced Speech And Association

BRAC asserts that the issue of the adequacy of a rebate, or demand and return, scheme "is academic in this case" because the court of appeals affirmed the portion of the district court's judgment providing for a reduction of future dues. Res. Br. at 11. The employees are not so confident that this feature of the judgment was left intact. Pet. Br. at 32. If the Court agrees that a dues reduction

[10] The litigation horrors catalogued by the NEA are more burdensome to dissenting employees than they are to unions. Undoubtedly the rights of many employees are violated without audible protest because they cannot afford litigation. These are not reasons for permitting rights to be violated. Rather, if "the accounting and proof problems involved" counsel a remedy which avoids such "practical" difficulties, the only remedy which also prevents the infringement of fundamental freedoms is one which releases protesting workers from all financial obligations to the union. *Street*, 367 U.S. at 779-80 (Whittaker, J., dissenting in part), 795-97 (Black, J., dissenting); *see id.* at 778-79 (Douglas, J., concurring).

system was affirmed by the Ninth Circuit, then that court's approval of a "rebate remedy," *Ellis* v. *Railway Clerks*, 685 F.2d 1065, 1069-70 (9th Cir. 1982) (App. Cert. 5a-6a), was unfortunate dicta. In that event, this Court should make it clear that, regardless of the outcome of this appeal, the judgment on remand must include a future dues reduction.

Moreover, the employees' challenge to the scheme approved by the lower courts is not "academic" even if it provides a reduction rather than a refund. Under the district court's judgment, the amount of the dues reduction each year is determined by BRAC. J.A. IV 366-67, 371. As a matter of law, not of fairness in fact, this requirement that objecting employees have the extent of their first amendment liberties determined by the very organization with which they have their dispute violates due process of law. Pet. Br. at 34 n.23.[11]

BRAC's scheme on its face is not the least procedurally burdensome alternative. The reduction could be made initially by a neutral arbiter. Under BRAC's system, known objectors must again step forward and request a neutral review. Such a scheme is constitutionally inadequate because it "is obviously set up to discourage the non-believers." *Schneider*, 565 F. Supp. at 976; *see Lamont* v. *Postmaster General*, 381 U.S. 301, 307 (1965).

Also, reduction of the dues by an amount determined to have been spent for impermissible purposes in a *prior* year does not "avoid the risk that [the employees'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood*, 431 U.S. at 244 (Stevens, J., concurring). Union spending patterns vary from year to year. *Allen*, 373 U.S. at 122. A scheme in which the union has unfettered discretion to expend a dis-

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[11] This defect would not be cured by a reduction determined by the so-called "Public Review Board," a body appointed and paid by BRAC. Pl. Ex. 1303. A scheme in which first amendment rights are determined by "a 'captive organization' . . . named by the very group it is supposed to police" "does not safeguard the rights of the dissidents." *Schneider*, 565 F. Supp. at 976; *see Glover* v. *St. Louis-S.F. Ry.*, 393 U.S. 324, 330-31 (1969); *Steele*, 323 U.S. at 206.

senter's dues, even if reduced by an estimated amount, does not *prevent* impermissible expenditures. At best, it merely decreases the amount of the dissenters' funds available for the union to "borrow" to finance political and institutional causes. Because it does not provide for temporary escrow of dissenters' funds, or segregation of funds,[12] the dues reduction scheme adopted by the district court is inadequate under the first and fifth amendments. Pet. Br. at 33-38.

IV. Congress Did Not And Constitutionally Could Not Intend To Coerce Support For Unions As Institutions

The essence of the argument of BRAC and its *amici* on the line-drawing issue is that in *Abood* and its Railway Labor Act precursors the Court recognized that Congress' purpose in enacting § 2, Eleventh was to authorize coerced financial support of *all* union selected activities, with two narrowly limited exceptions. Res. Br. at 12-41; AFL-CIO Br. at 22-30; NEA Br. at 10-21. Those exceptions are described by *amicus* AFL-CIO as (1) "ideological communications completely divorced from [the union's] representational concerns" and (2) "political candidate expenses." AFL-CIO Br. at 28. In the unions' view, Congress sanctioned the use of coerced dues for any other purpose, no matter how ideological, and no matter how remote its relationship to the union's duties as exclusive representative in

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[12] If the union maintained a segregated fund and paid all and only bargaining costs from that fund, escrow would be unnecessary. Each employee in the bargaining unit would be assessed an equal amount for that fund, and voluntary members could also pay dues to a second fund for the union's political and institutional activities. In a given year, if the bargaining assessment based on projected expenditures proved insufficient to meet actual bargaining costs, an additional assessment could be made. If the original assessment were excessive, the excess could be refunded or carried over into the next year. Such a simple system would avoid the accounting problems created by the union's blurring of the distinction between "financial core" and voluntary members.

the employees' bargaining unit.[13]

However, the arguments which the unions use and the legislative history which they cite to support their permissive reading of § 2, Eleventh are not new. The same arguments were made in *Street* by the unions in that case and by Justice Frankfurter in dissent. *See Street*, 367 U.S. at 800-03, 811-18. In addition, the *Street* Court exhaustively examined the legislative history of the Act in general and § 2, Eleventh in particular. *Id.* at 750-70.

The result was that the Court rejected the arguments and the interpretation of the legislative history urged here by the unions: "The conclusion to which this history clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." *Id.* at 763-64. Those expenses, and those alone, were *clearly* what Congress meant to force employees to support. *Id.* at 750-64.

Moreover, the legislative history made it "abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider,'" the employee "who did not support his representative's performance of its functions under the Act." *Id.* at 764 n.15, 767. Respecting this congressional purpose, the Court "construe[d] § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money." *Id.* at 768.

Street did not "delineate the precise limits" of the unions' power under § 2, Eleventh because only the question of union political activities, including lobbying, was presented by the decisions of the Georgia courts. *Id.* at 744 n.2, 768-70 & n.17. However, the same reasoning which led the Court to hold that the unions' power under the statute

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[13] The *amici* even suggest that Congress sanctioned the use of coerced dues for lobbying for legislation which affects the employees' industry, benefits, or working conditions, and for voter registration and get-out-the-vote drives. AFL-CIO Br. at 25 n.18, 28 n.21, 29 n.23; NEA Br. at 18-21.

"is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes," *id.* at 768, applies to the union institutional activities at issue in this case.

Indeed, Justice Whittaker understood both *Hanson* and *Street* to hold that in § 2, Eleventh "Congress intended to, and impliedly did, limit the use that railway labor unions may make of [compulsory dues], only to defray the costs of negotiating and administering collective bargaining agreements—including the adjustment and settlement of disputes . . . ." *Street*, 367 U.S. at 779 (opinion concurring in part). Justice Douglas agreed, *id.* at 776 (concurring opinion), explaining that "the narrow and precise holding of the *Hanson* case" was as shown by Justice Black, *i.e.*,

> only that workers could be required to pay their part of the cost of actual bargaining carried on by a union selected as bargaining agent under authority of Congress, just as Congress doubtless could have required workers to pay the cost of such bargaining had it chosen to have the bargaining carried on by the Secretary of Labor or any other appropriately selected bargaining agent.

Id. at 787 (Black, J., dissenting). Even Justice Frankfurter, who thought that Congress authorized union political expenditures, believed that the *Street* decision "implies that Congress meant its amendment to be read as providing that members of the union may restrict their dues solely for financing the technical process of collective bargaining." *Id.* at 802 (dissenting opinion).

Such a reading of the statute is entirely reasonable. When Justice Douglas spoke of "the cause which justified bringing the group together," *id.* at 778 (concurring opinion), the "cause" to which he referred was collective bargaining, and the "group" was the bargaining unit. He did not refer to the cause of improving working conditions in the abstract, nor to the union as an institution. The purpose of § 2, Eleventh was to help defray the costs of the functions and duties which the Act *imposed* upon representatives, not of all concerted activities which the Act merely allowed or protected.[14]

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[14] *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-66 & n.16 (1978),

The district court and the Ninth Circuit dissent recognized that none of the institutional activities at issue here are among the functions and duties which BRAC performed as bargaining agent for employees of Western Airlines. *Ellis*, 685 F.2d at 1075-76 (Whelan, J.) (App. Cert. 14a-16a); J.A. IV 236-37, 239, 245. The consequences of this view of the limits of § 2, Eleventh are not unsettling, as BRAC claims. If joint bargaining occurs on an industry-wide basis, its costs may be allocated among all of the bargaining units involved.[15] If Grand Lodge officers and employees assist in bargaining and contract administration at a particular unit, the appropriate portion of their salaries, and of allocable overhead, can be charged to employees in that unit. If bargaining problems at a particular unit are dealt with at a convention or in a union publication, the allocable portion of the convention or publication expenses may be a chargeable cost.

Any broader view of what Congress sanctioned requires strict scrutiny of the statute. In *Buckley*, 424 U.S. at 91 n. 124, the Court impliedly endorsed the principle that the Constitution permits "no compulsion upon individuals to finance the dissemination of ideas with which they disagree." The

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acknowledges this distinction between collective bargaining activities and other concerted activities, and that unions may be prohibited from using compulsory dues for some activities which are protected by the Act.

[15] Joint bargaining is not the same as "pattern" bargaining. A contract, or litigation, in one unit may set a precedent for labor relations in another. That effect is the same even if the bargaining agents in the two units are different unions. Congress could not rationally have intended that the determinant of whether the cost of an activity may be taxed to dissenting employees is an affiliation vote in another bargaining unit or the fact that the activity provides indirect economic "benefit." The only "benefits" which justify the compulsory fee are those received by employees from the bargaining activities of their exclusive representative which must be performed on behalf of " 'all employees . . . , union and nonunion,' *within the relevant unit*" and which, therefore, presumptively provide "benefits of union representation that *necessarily* accrue to all employees." *Abood*, 431 U.S. at 221-22 (emphasis added).

Court there cited the opinions of Justices Black and Douglas in *Lathrop* and *Street*. Among the cited passages is one which states eloquently why § 2, Eleventh cannot survive strict scrutiny if it is construed as the unions contend:

> I believe the First Amendment bars use of dues extorted from an employee by law for the promotion of causes, doctrines and laws that unions generally favor to help the unions, as well as any other political purposes. I think workers have as much right to their own views about matters affecting unions as they have to views about other matters in the fields of politics and economics. . . . In my view, § 2, Eleventh can constitutionally authorize no more than to make a worker pay dues to a union for the sole purpose of defraying the cost of acting as his bargaining agent. Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs.

Street, 367 U.S. at 790-91 (Black, J., dissenting).

Justice Douglas noted in *Lathrop*, 367 U.S. at 878 (dissenting opinion), that "[t]he groups whose activities are or may be deemed affected with a public interest are indeed numerous." The precedent which the unions would establish in this case is one which would "practically give *carte blanche* to any legislature to put . . . into goose-stepping brigades," *id.* at 884, *any* "group of individuals with some common role or affiliation." *See* AFL-CIO Br. at 23-27. "Those brigades are not compatible with the First Amendment." *Lathrop*, 367 U.S. at 885 (Douglas, J., dissenting). Section 2, Eleventh must be construed as not authorizing the prototype brigades.

CONCLUSION

The Court should reverse the decision of the Ninth Circuit and grant the relief requested in the Brief for Petitioners.

Respectfully submitted,

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No. 82-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

ALLEN L. FAILS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of respondents in this case. Petition-

ers have refused to consent to the filing of that *amicus curiae* brief.

Interest of the Amicus Curiae and The Issues Covered In The Attached Brief

The AFL-CIO is a federation of 96 national and international unions having a total membership of 13,500,000 working men and women. Its interest in the instant case is evident: many AFL-CIO unions covered by the Railway Labor Act have negotiated union security clauses in collective agreements; these clauses provide stability in labor relations by assuring that all employees in the repsented units contribute toward paying the costs of the union's activities. The AFL-CIO has long supported legislation permitting union security provisions, and has participated as *amicus curiae* in this Court's cases concerning the validity and application of such provisions.

The attached *amicus curiae* brief is addressed to the theoretical underpinnings of the constitutional standard announced in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). We demonstrate that the *Abood* standard permitting expenditure of agency shop fees for any expense "germane to" collective bargaining, and permitting objecting employees to opt out of paying only for political activity and ideological activity unrelated to collective bargaining, is no First Amendment anomaly. Rather, the *Abood* standard reflects both the weak, attenuated, and indirect nature of the First Amendment interests relied upon by petitioners and the strong state interest in a viable system for maintaining industrial peace. By providing for limited individual exclusions only where the state interest is weakest or the First Amendment protections elevated, *Abood* both preserves the legislature's authority to advance industrial peace through union security provisions and provide dissenters with protection in those circumstances in which their constitutional claim is more than ephemeral.

CONCLUSION

For the reasons stated above, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' entire argument on the central substantive issue in this case can be restated, with no loss of subtlety or nuance, in a single paragraph: Because *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) states that mandatory support of their exclusive bargaining representative has "an impact" on objecting employees' First Amendment interests, exactly the same constitutional standard of review must be applied to each union expenditure as would be applied to a statute decreeing that no employee may, on pain of imprisonment, voice his criticisms of his exclusive bargaining representative or of the concept of collective bargaining. From that premise petitioners draw the conclusion that the Constitution provides that objectors may only be required to pay their proportionate share of union expenses "necessary" or "essential" to collective bargaining. Pet. Br., at 13. Therefore, argue petitioners, the Railway Labor Act must be read to incorporate that severely limited standard, even though such a standard nowhere appears in the statutory language and is never even mentioned in the 33-page *Abood* opinion.

This argument suffers from the fatal defects that its conclusion is entirely inconsistent with what the Court *said* in *Abood* and in its three Railway Labor Act predecessors (*Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963)), and with the underlying reasoning of those cases.[1]

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[1] Moreover, the refusal of the *Abood* majority to adopt petitioner's conclusion or the argument underlying that conclusion, was no mere oversight: The minority opinion in *Abood* put forward an identical proposition to the one petitioners' support, backed by a

Thus, petitioners ask the Court to reverse a recent, considered constitutional ruling. To support this extraordinary request, however, petitioners simply string together a series of quotations torn from their context of First Amendment cases concerning direct governmental inhibition of traditional, affirmative First Amendment rights. This brief is devoted to a demonstration that, contrary to petitioners' suggestion, the *Abood* holding is in no way a First Amendment anomaly. Rather, the *Abood* approach reflects an appropriate recognition that the right claimed here to refuse to pay money for expenditures of which one disapproves implicates First Amendment values only to a very limited degree. As such, *Abood*'s holding fits comfortably into this Court's First Amendment jurisprudence, as several cases decided after *Abood* particularly confirm.

I. The "right" upon which petitioners rely as "transcendent" (Pet. Br. 26) is in fact an extremely limited nonassociational interest. In many ways, indeed, petitioners are claiming a personal right of dissent which could be raised with regard to a broad range of legislation. Governmental subsidies of private speech are widespread in our society, and have never been thought to transgress the constitutional rights of those who disagree with a particular subsidized organization or its policies.

The reason the First Amendment does not strictly limit governmental activity in the manner petitioners' argument would suggest is that the Constitution is nowhere near as rigid as petitioners suppose. As this Court has recently made clear on several occasions the level of scrutiny accorded governmental action with First Amendment implications varies both with the strength of the First Amendment interest and the nature of the governmental interference. In this instance, the First Amend-

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similar constitutional thesis; unlike petitioners, however, the *Abood* minority explicitly recognized that the *Abood* majority had held otherwise. See 431 U.S., at 254-255 (opinion of Powell, J., concurring in the judgment).

ment right relied upon, for three reasons, justifies only limited judicial intervention: First, it concerns only monetary contributions, themselves an attenuated form of speech; second, it is an inverse right of nonspeech, a right this Court has made clear is *not* the mirror image of affirmative First Amendment rights entitled to the highest form of protection; and third, the government is involved in this statutory scheme in only the most indirect way, so that any fear of government-imposed orthodoxy is quite ephemeral.

II. *Abood* concluded that the governmental interest in preserving industrial peace by permitting union shop agreements was sufficient, except in two limiting circumstances, to justify any minimal attenuated impedence of petitioners' interest in "freedom of mind" which conceivably flows from such agreements. As *Abood* recognized, the very "free rider" rationale underlying union shop clauses demands that unions be permitted wide berth in spending agency-shop fees. For just as the tax system would be destroyed if widespread individual self-exclusion were allowed, so the union shop could not fulfill its purposes if individuals could opt out of paying for all but those expenses judicially determined to be essential for collective bargaining narrowly defined.

Abood did, however, permit objecting employees to refuse to pay for two categories of expenses. The first—ideological expenses unrelated to collective bargaining—is simply that class of expenses as to which the stated governmental interest has no pertinence whatever; that being so, even minimal interference with First Amendment interests is unjustified. The second category—contributions to political candidates—implicates an area—partisan elections—in which the Court has been especially sensitive to the need to preserve individual autonomy and to prevent governmental intervention. Consequently, *Abood*'s two narrow exceptions in no way justify the enormous intrusion sought by petitioners into the union security system Congress believed would best further industrial peace.

ARGUMENT

I. PETITIONERS' CLAIM RESTS ON A WEAK AND ATTENUATED CONSTITUTIONAL RIGHT AND IS ENTITLED ONLY TO LIMITED FIRST AMENDMENT PROTECTION

1. It is well to begin by highlighting once again (*see Abood*, 431 U.S. at 230) the precise nature of the right petitioners claim. First, in permitting union security provisions under the Railway Labor Act, Congress was careful to assure that employees' affirmative rights of speech and of association would not be affected. It was for this reason that proposed § 2 Eleventh of the RLA was amended before passage to provide that an employee may not be discharged if union "membership was denied or terminated for any reason other than" the failure to pay required dues. *Street*, 367 U.S., at 765.[2] Moreover, that RLA protection against union censorship of the speech and association rights of employees was augmented by the passage in 1959 of the Landrum-Griffin Act's free speech protections for union members. *See* 29 U.S.C. § 411(a)(2). Consequently, this case involves neither government suppression of speech (or of association) nor governmental approval of such suppression by a private group; instead, the government affirmatively *protects* the rights of employees covered by a union shop provision to speak out against union policies and to associate with others to do so.

Second, petitioners are not required to be full union members in any sense and need not participate in any way in any union activities. *See generally, Labor Board v. General Motors*, 373 U.S. 734, 742-743 (1963) ("'Membership' as a condition of employment is whittled down

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[2] As *Street* recounts (367 U.S., at 765), the original proposal led to objections that "the right of free speech is at stake. . . A man could feel that he was no longer able freely to express himself because he could be dismissed on account of criticism of the union." Hearings on H.R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong., 2nd Sess., p. 115.

to its financial core."). There is no realistic ground for hypothesizing that responsibility for or agreement with the union's activities or policies would be ascribed to objecting employees such as petitioners. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). Thus, the *only* sense in which petitioners are being required to associate themselves with the union or its policies is by paying a relatively small amount of money to that organization each month.

Third, at least some of the union activities petitioners claim a right to refuse to finance are not protected even in an affirmative sense by the First Amendment. As *Abood* recognized, the First Amendment right of association concerns only association "for the purpose of advancing beliefs and ideas." 431 U.S., at 231. Indeed, no right of association is expressly stated in the First Amendment; rather, the free association right was judicially derived from the explicit constitutional protection because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449 (1958); *see also, e.g., Buckley v. Valeo*, 424 U.S. 1, 65 (1974); *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 121 (1981). Thus, the First Amendment does not guarantee the right to engage in purely social or purely economic affiliations with other individuals.[3] In large part (most obviously, with respect to

[3] *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (while "parents have a First Amendment right to send their children to educational associations that promote the brief that social segregation is desirable, and th[e] children have an equal right to attend such institutions . . . it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." *See also* L. Tribe, *American Constitutional Law* (1978), at 702.

The consequences of any broader view of the First Amendment right of free association would be extremely disruptive of well-accepted governmental regulation. The First Amendment has never been thought to protect against close regulation of entities, such as

union expenditures for social activities and death benefits), petitioners are claiming a negative First Amendment right as to associational activities with no obvious connection to the communication of any ideas whatever. Thus, petitioners are claiming a right of nonassociation broader in scope than the affirmative right of free association, and one which seems to encompass the right not to pay for any *activities* with which one disagrees.

Finally, while they fail to acknowledge as much, petitioners are actually claiming the right not to be bound by decisions made, not by the government, but by their fellow employees, in accord with democratic procedures assuring petitioners themselves the option to be heard. The RLA does not mandate that employees be represented by a union; that decision is made by majority decision of the employees (§ 2, Ninth). Moreover, union officers are, of course, subject to periodic elections, in accordance with the stringent protection of Title IV of the Landrum-Griffin Act, 29 U.S.C. § 481 et seq. Finally, spending and policy decisions of the union are made in accordance with the union constitution. While petitioners do not have a voice in those union decisions, that is by their own choice. See § 2 Eleventh (a). Thus the RLA's scheme mirrors that of democratic society generally: Individuals are given an opportunity to participate in some manner (usually, in the general society, considerably more indirectly than in the present context) in the decision as

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unions and corporations engaged in their economic functions, even though the general right of workers to band together to *advocate* collective bargaining and improved working conditions is protected by the First Amendment (*Smith v. Arkansas Highway Empl.*, 441 U.S. 463 (1979); *Babbitt v. United Farm Workers*, 442 U.S. 289, 313 (1979)), and the political speech of corporations is accorded full First Amendment protection (*First National Bank v. Bellotti*, 433 U.S. 765 (1976); *compare Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-564 (1980) (limited First Amendment protection accorded commercial speech as it concerns lawful activity)).

to which policies should be pursued and which means used to pursue those policies, and they may decline that opportunity (for example, by not voting in elections); but the decision to decline to participate, whether because of ideological disbelief in the extant form of government or otherwise, does not ordinarily lead to any constitutional right not to be bound by the majority's decisions.

2. Indeed, as this examination of the relatively remote right petitioners rely on as "transcendent" (Pet. Br. 26) should suggest, the RLA's scheme is similar not only in one way but in many to the scheme governing the relationship between taxpayers and the government in our society. In both instances, there is no general suppression of speech or of association for speech purposes; indeed, there is enforceable protection of the right affirmatively to dissent and to associate to further dissent.[4] In both instances, there is ordinarily no obligation to support, or to appear to support, any entity or its policies, other than by exacted financial support. Thus, just as the union may not under the RLA require represented employees to profess an oath of loyalty to the union or to wear union buttons, so the government may not under the First Amendment compel the recitation of a pledge of allegiance (*West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)), or the display of a license plate with a government-prescribed ideological message (*Wooley v. Maynard*, 430 U.S. 705 (1977)).

Further, the government subsidizes through tax dollars a wide range of activities affirmatively protected by the First Amendment when engaged in by individuals, as well as many that are not. Modern government

> is involved not only in many programs with no obvious communicative impact but, as well, in running museums, theatres, libraries, and schools, and in supporting through grants to private parties a myriad of pub-

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[4] In the case of the government, that protection is, of course, the First Amendment.

lications, reports, meetings, conferences, advertisements, and litigation.[5]

For example, the National Endowment for the Humanities (20 U.S.C. § 956 et seq), the National Science Foundation (42 U.S.C. § 1861 et seq.) and the National Endowment for the Arts (20 U.S.C. § 954 et seq.) all operate in large part by providing grants to private individuals and groups for scholarly or artistic work. Public television and radio stations, controlled by local non-profit organizations, receive substantial governmental subsidies through the Corporation for Public Broadcasting (47 U.S.C. § 396). The Legal Services Corporation provides funds for advocacy to private non-profit organizations (42 U.S.C. § 2996). Indeed, even commercial television involves, as a realistic matter, massive governmental subsidies in the form of free use of the limited spectrum of airwaves. Schiffrin, *supra*, 27 UCLA. Rev., at 624.

"In substance, compelled contributions [to unions] and government taxes [for subsidized speech] are much the same." Schiffrin, *supra*, 27 UCLA L. Rev., at 594. This is certainly not to say that unions may exact fees for anywhere near the broad range of purposes for which the government may do so; the appropriate scope of activities

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[5] *See generally* on the role of modern government in controversial activities generally, and in speech-related activities specifically, Schiffrin, *Government Speech*, 27 U.C.L.A.L.Rev. 565 (1980); *see especially id.*, at 593, 606:

> Compelled contributions to ideological causes with which some taxpayers violently disagree are the norm, not the exception. . . . It is simply too late in the day to propose that the Government Printing Office must close up shop, that subsidies for broadcasting and the arts must be abandoned, [or] that [for] legislatures and Commissions [to] produce public reports [is] unconstitutional.

See also M. Yudof, *When Government Speaks* (1983), especially 7 ("A recent study found that the federal government spends at least $500 million a year on hundreds of films, slide shows, TV programs, and radio broadcast.").

of unions and of government obviously differ enormously, and societal assessment of the strength of the interest in requiring financial support in the two circumstances will surely differ as well. For present purposes, however, the relevant issue is whether there is at stake in this case, as petitioners claim, a *First Amendment right* of nonassociation through financial support of the same stature as traditional affirmative free speech rights. For that purpose, we can see no reason to differentiate the First Amendment interests at stake in assessing the constitutionality of government action in the form of a statute overriding state law to permit required financial support of a private entity and government action in the form of a disbursement of tax dollars to a private entity.

The similarity between the interest claimed here to be entitled to First Amendment protection and that of ordinary citizens who disapprove of governmental expenditures suggests that the right relied on is not as "transcendent" as petitioners claim. "Government might well come to a halt if each taxpayer could decide not to pay taxes for programs or communications activities to which he or she personally objected." M. Yudof, *supra*, *When Government Speaks*, at 206. Thus, in insisting upon their wooden First Amendment analysis, petitioners are asking this Court to "sacrifice good sense to a syllogism." O. Holmes, *The Common Law* (1881), at 36.

3. The First Amendment requires no such sacrifice. In recent years, this Court has recognized that intrusions upon expressive activity formerly thought to be outside the First Amendment's proscription do to some degree implicate the policies underlying the system of free expression. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968) (public employees are in some circumstances protected from discharge on the basis of their criticism of the government or of government officials); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1975) (purely commercial speech implicates First Amendment values); *Buckley v.*

Valeo, supra (First Amendment protects the right to spend money on political campaigns); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (First Amendment protects communicative activity by students in secondary schools). At the same time, the Court has been careful to insist that as the First Amendment interest relied upon becomes more attenuated or the form of government infringement less severe, the strict judicial scrutiny approach developed in the context of direct government suppression of traditional communicative activity is not necessarily applicable.

For example, in *Connick v. Myers*, —— U.S. ——, 51 U.S.L.W. 4436 (April 20, 1983), the Court addressed the application of the *Pickering* doctrine to a situation in which the employee's speech centered upon employment-related grievances not of general public concern. The Court was careful "not [to] suggest that [the employee's] speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment," noting that the First Amendment guards from actual censorship both "great secular causes [and] smaller ones." *Id.* at 4438. But the Court held, nonetheless, (1) that insofar "as [the employee's] communication cannot be fairly characterized as constituting speech on a matter of public concern, *it is unnecessary for us to scrutinize the reasons for her discharge* . . . [even] if the reasons for the dismissal are alleged to be mistaken *or unreasonable*" (*id.*, at 4438 (emphasis supplied)); and (2) that as to employee speech which *does* touch on matters of public concern, there is no necessity that the government assume any "burden to 'clearly demonstrate' that the speech involved 'substantially interferred' with official responsibilities"; rather "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. . ." (*id.*, at 4439). Thus, the Court in effect adopted a "sliding scale" approach in that particular context, varying the degree of judicial scru-

tiny with the strength of the First Amendment interest involved.[6]

Similarly, this Court has recognized that where the governmental action complained of affects First Amendment activity in a partial, indirect, or attenuated manner, there is no occassion to apply the strict scrutiny standard in reviewing the validity of the governmental program. For example, in *Regan v. Taxation with Representation* ("*TWR*"), —— U.S. ——, 51 U.S.L.W. 4583 (May 23, 1983), the question was whether Congress could deny a tax deduction for lobbying activity by certain nonprofit groups while providing such a deduction for lobbying by other such groups. The Court recognized that nonprofit organizations indeed have a constitutional right to engage in lobbying, and recognized as well that "tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Id.*, at 4584. The Court rejected, however, the contention that " 'strict scrutiny' is required because the statute '*affect*[*s*] First Amendment rights on a discriminatory basis.' " *Id.*, at 4585. Noting that the government did not in any way *prevent* TWR from lobbying and that " 'constitutional concerns are greatest when the State attempts to impose its will by force of law' " (*id.*, at 4586, *citing Maher v. Roe*, 432 U.S. 464, 476 (1977), the Court held that, except "[w]here government provision of sub-

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[6] Other instances in which the Court has determined that the nature of the First Amendment interest implicated demands a more relaxed level of judicial review include: *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. at 563-64; *Buckley v. Valeo*, *supra* (limitation of contributions to political campaigns) (see pp. 12-14, *infra*, regarding the implications of this *Buckley* holding for this case); *Board of Education v. Pico*, 457 U.S. 853, 869-70 (1982) (plurality opinion); *id.*, at 875, 877 (Blackmun, J., concurring) ("the unique environment of the school places substantial limits on the extent to which official decisions may be restrained by First Amendment values . . . [b]ut . . . also makes it particularly important that *some* limits be imposed"); *see also*, *id.*, at 904, 907, 915 (Rehnquist, J., dissenting).

sidies is 'aimed at the suppression of dangerous ideas'," or is "irrational" (*id.*, at 4586), the decision to select "particular entities or persons for entitlement to this sort of largesse 'is obviously a matter for policy and discretion not open to judicial review.'" *Id.*, at 4585, quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937).[7]

4. In this instance, there are at least three different reasons, each quite sufficient in itself, supporting the *Abood* holding that, at a minimum, agency fee funds may constitutionally be spent on any matters "germane to collective bargaining." 431 U.S., at 219.

(a) As petitioners recount, this Court held in *Buckley v. Valeo*, that "[s]peech does not lose its first amendment protection because money is spent to project it." (Pet. Br. 8.) But this Court had considerably more to say in *Buckley* concerning the relatively remote connection between money contributions to others for the purpose of speech and the interests protected by the First Amendment than petitioners admit.

What *Buckley* actually *held* was that contribution limitations can often be sustained although expenditure limitations are ordinarily invalid. 424 U.S., at 58. The reason is that:

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[7] Other circumstances in which the mode of governmental interference with First Amendment rights has been held too attenuated to require the most exacting judicial scrutiny include: *Young v. American Mini Theatres*, 427 U.S. 50, 70-71 (1976) (plurality opinion); *id.*, at 73 (Powell, J., concurring) (where the government has "silenced no message[,] . . . invoked no censorship [and there is no] significant curtailment of . . . the opportunity for a message to reach an audience," full First Amendment scrutiny is not called for); *Perry Education Associaiton v. Perry Local Educators' Association*, —— U.S. ——, 51 U.S.L.W. 4165, 4168, 4170 (Feb. 23, 1983) (in determining access to governmental property which is not a public forum "the decision to grant [access] privileges . . . need not be tested by . . . strict scrutiny"); *Buckley v. Valeo*, 424 U.S., at 669-670 (program providing public financing of some candidates need not survive strict scrutiny).

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or a political committee entails only a *marginal restriction upon the contributor's ability to engage in free communication.* A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the indifferentiated symbolic act of contributing . . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his . . . communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss issues. [424 U.S., at 20-21 (emphasis supplied).] [8]

In accord with this analysis, the Court refused to inquire into the *amount* of the contribution limitation. *Id.*, at 30.[9]

In this instance, as noted (pp. 4-5, *supra*), the *only* required connection between the union and a dissenting

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[8] The *Buckley* court recognized as well that there, as here, associational freedoms were also involved, but noted that contribution limitations "leave the contributor free to become a member of any . . . association and to assist personally in the associations efforts on behalf of candidates." *Id.*, at 22.

[9] In *California Medical Association ("CMA") v. Federal Election Commission*, 453 U.S. 182 (1981), a plurality of the Court characterized *Buckley* as holding that contributions are " 'speech by proxy' " and involve only "some limited element of protected speech." *Id.*, at 196 & n.16. On this basis the *CMA* plurality held that "Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme." *Id.*, at 199 n.20. (The dissenters in *CMA* did not express disagreement with this analysis; instead, they dissented solely on jurisdictional grounds.)

employee is a relatively small periodic fee. *Hansen*, *Street*, *Allen*, and *Abood* have already held that *some* such contribution to the exclusive bargaining representative is constitutionally justified; thus, "the undifferentiated symbolic act of contributing" (*Buckley*, 424 U.S., at 21) is *not* here at issue. And, as in *Buckley*, only "speech by someone other than the contributor" is involved in this case, and a union decision to spend exacted fees on one rather than another program has no effect on "the contributor's freedom to discuss issues." *Id.*[10]

(b) Indeed, the First Amendment interest involved here is *more* attenuated than that involved in *Buckley*, for that interest concerns not the affirmative opportunity to speak explicitly protected by the First Amendment but an implied, negative right not to do so.

This Court has not had the occasion to explore at any length the appropriate relationship between the constitutional protection accorded speech and association and the protection accorded a refusal to speak or associate. Rather, the Court has in a total of two cases (other than *Abood*) upheld such claims on the basis of the particular circumstances presented (*West Virginia Board of Education v. Barnette*, *supra*; *Wooley v. Maryland*, *supra*) while refusing to recognize such a claim in another instance (*Pruneyard Shopping Center v. Robins*, *supra*).[11]

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[10] We note that *Buckley* involved contributions to political candidates, while this case does not. As we explain in Part II, *infra*, protection of speech concerning political candidates has long been understood to be at the core of the First Amendment. For this reason, it is particularly significant that *Buckley nonetheless* held the First Amendment interests implicated by the contribution limitations there at stake to be "marginal." Outside the partisan political context the First Amendment protection of the right to make a monetary contribution in any amount would, we believe, be even more limited than in *Buckley*.

[11] It is important to distinguish the right of non-association or "non-speech" from the superficially similar situation in which *exercise of the affirmative right to associate leads to adverse action against the person exercising that right*. For example, in *Elrod v.*

In other circumstances, however, the Court has made clear that constitutional rights are not to be mechanically read as invariably implying their precise obverse:

> *The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.* For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States v. Kobli*, 172 F.2d 919, 924 (C.A.3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, see *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245; *Kersten v. United States*, 161 F.2d 337, 339 (C.A. 10th Cir. 1947), cert. denied, 331 U.S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. [*Singer v. United States*, 380 U.S., 24, 34-35 (1965) (emphasis added) (holding that the right to trial by jury does not establish the right to a judge trial).]

Similarly, when the Court "follow[ing] the approach of *Singer*," determined that the Sixth Amendment's right to

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Burns, 427 U.S. 347, 355-56 (1976), the plurality held that requiring adherence to one political party in order to retain one's job meant that

> [a]n individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. . . .

Thus, insofar as *Elrod* is premised on associational rights, that decision involves protection of affirmative rights and not the purely negative right to refrain from associating at all. See Gaebler, *First Amendment Protection Against Compelled Expression and Association*, 23 Boston Coll.L.Rev. 995, 996 n.4 (1982). See also *Branti v. Finkel*, 445 U.S. 507, 514-516 (1980) (*Elrod* also based on protecting right to one's own "private political beliefs").

counsel guarantee is to be read as providing the right to proceed *pro se*, the Court stressed that "[t]he inference of rights is not, of course, a mechanical exercise" and such an "implied right must arise independently from the design and history of the constitutional text." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975).

Thus, the right *not* to speak or *not* to associate is by no means to be determined simply by inverting the holding of *Buckley*, or by concluding that anything the union has a First Amendment right to do, objecting employees have a First Amendment right not to financially support.[12] Indeed, an examination of the few negative First Amendment rights cases demonstrates that the "design" of the First Amendment supports implication of inverse rights only in a narrow range of circumstances.

The two recognized purposes of the First Amendment are: (1) " 'to secure the widest possible dissemination of information from diverse and antagonistic sources' [so as] 'to assure unfettered interchange of ideas for the bringing about of political and social change desired by people' " (*New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)); and (2) "[t]he individual's interest in self-expression" (*First National Bank v. Bellotti*, 435 U.S. at 777 n.12). Of these two values, the first, the "marketplace of ideas" value, is the source of the right of association, itself *implied* from the Constitution on the ground that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *N.A.A.C.P. v. Claiborne Hardware Co.*, —— U.S. ——, 50 U.S.L.W.

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[12] As noted (pp. 5-6, *supra*), petitioners are, in large part, claiming a First Amendment right not to contribute toward activity with *no* First Amendment coloration of its own. We can conceive of no reason for concluding that implied, inverse First Amendment rights are *broader* in scope than the affirmative protections from which they are derived. Consequently, petitioners have no more free speech right *not* to contribute toward, for example, death benefits than the union does to maintain a death benefit program, precisely no First Amendment right at all.

5122, 5128 (July 2, 1982) quoting *NAACP v. Alabama*, 357 U.S. at 460.

A supposed "right" to remain isolated from the expressive activity of others, or not to communicate at all, is for the most part divorced from the "marketplace of ideas" purpose of the First Amendment. An individual who refuses to express his or her views, or to associate with others for the purpose of communicating views, is quite obviously not enhancing but contracting the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote.

It is, of course, true that an individual may object to the fact that through association, ideas opposed to his own may ultimately be magnified in volume and importance. But at least where, as here, the individual remains entirely free to add his own voice to the dialogue, and to associate with others to do so, the potential impact of an involuntary payment upon the interchange of ideas is negligible. Indeed, in *Regan, supra*, this Court necessarily rejected the notion that when the government grants a limited, solely financial advantage to one organization's speech activity that grant constitutes such a fundamental distortion of the balance of public dialogue as to violate the First Amendment. That is why *Regan* rejected the proposition that one group not similarly favored has a right to end a government subsidy to another group for lobbying purposes. Any other conclusion would make unconstitutional the entire spectrum of governmental speech activity and of governmental support for communications by private individuals. *See*, pp. 7-9, *supra*. For any other conclusion would read into the free speech clauses of the First Amendment an analogy to the neutrality requirement of the religion clauses and thereby bring all such government activity to a halt by, for example, requiring the government to print everything or print all first submitted materials if the government printed anything. This Court, presumably for this reason, has expressly held that analogy to be "patently inapplicable." *Buckley v. Valeo*, 424 U.S., at 92.

It is, therefore, not surprising that only the other branch of First Amendment values, concerning the preservation of individual integrity, has been at issue in the negative First Amendment right cases. In *Barnette* the Court was concerned to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control" (319 U.S., at 642); and in *Wooley* the Court characterized the interest at stake as "the broader concept of individual freedom of mind" (430 U.S., at 714). *See also Abood*, 431 U.S., at 234-35; *Elrod v. Burns*, 427 U.S., at 356-57.

Barnette and *Wooley* themselves make clear that it is not to be lightly inferred that governmental activity is aimed at imposing such official control. Both cases expressly recognize that the First Amendment injury alleged in those cases did *not* arise simply from the fact that the government was sponsoring communicative activity with taxpayers' money. Thus, in *Barnette*, the Court stated: "National unity as an end which officials may foster by persuasion is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." 319 U.S., at 631, 640. And, in *Wooley* as well, the Court recognized that where "[t]he State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism . . . the State may legitimately pursue such interests in any number of ways." 430 U.S., at 717. *See also Board of Education v. Pico*, 457 U.S., at 864 (plurality opinion); *id.*, at 876 (Blackmun, J., concurring); *id.* at 889 (Burger, C.J., dissenting); *id.*, at 896-97 (Powell, J., dissenting); *id.*, at 909, 915 (Rehnquist, J., dissenting).

The injury redressed in *Barnette* and *Wooley* inhered, then, not in some automatic right of silence mirroring affirmative First Amendment protections but, instead, in two special factors common to those cases: First, in both instances citizens were required to make direct, intimate, affirmative professions of belief. In *Barnette*, for example, the question was whether children compelled to at-

tend school could be required to rise on their own two feet and utter prescribed thoughts out of their own mouths. In *Wooley*, the central question was whether an individual required to carry on a car's license plate a political message with which he or she disagreed was being asked to engage in a compelled affirmation of belief in the *Barnette* sense. The Court stated: "Here, as in *Barnette*, we are faced with a state measure *which forces an individual, as part of his daily life* * * * [to] becom[e] the *courier for* * * * *a message*." 430 U.S., at 715, 717 (emphasis added).

Second, in both *Barnette* and *Wooley* the *only* governmental purpose was the *didactic* one of inculcating a government-prescribed message. In *Barnette*, "[T]he Resolution of the Board of Education did not adopt the flag salute because it was claimed to have educational value. It seems to have been concerned with promotion of national unity." 319 U.S., at 631 n.12. And in *Wooley*, the Court did not find credible the state's submission that a purpose of its rule was to "facilitate[] the identification of passenger vehicles" (430 U.S., at 716); instead, the Court found the *only* purpose to be "promot[ing] appreciation of history, individualism, and state pride," an interest which "is not ideologically neutral" (*id.*, at 716, 717).

Pruneyard Shopping Center v. Robins, *supra*, makes clear that the negative First Amendment interest protected in *Barnette* and *Wooley* is not simply the inverse image of established First Amendment rights, but depends instead on the two particular factors common to those cases. In *Pruneyard*, the argument was advanced that a shopping center owner has a First Amendment right to refuse to allow his property to be used to convey any message. The Court, however, found no consitutional infringement whatever, stressing: first, the impersonal character of the property at issue (*id.* at 87) ("[m]ost important, the shopping center . . . is not limited to the personal use of its owner"); and second, that

the government was not pursuing a solely didactic purpose (*id.*, at 86) ("no specific message is dictated by the State"). Yet, had *Pruneyard* involved the opposite situation—*viz*, had California been attempting to *prevent* the shopping center from allowing political speech on its premises—the First Amendment rights of the shopping center owner would surely have been infringed. *See First National Bank v. Bellotti, supra*; *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

The present circumstances are considerably closer to *Pruneyard* than to *Wooley* and *Barnette*: The only link between the objecting employees and the union are periodic payments of money; those employees are not required to utter or to carry on their person *or* their personal property any message whatever. And the government's general purpose in permitting the requirement of financial support is to further industrial peace, and not solely to inculcate in the populace a particular ideological belief. Consequently, union shop clauses, like government speech subsidies, do not, as an ordinary matter, significantly implicate the First Amendment interest in "individual freedom of mind," although (as *Abood* held, 431 U.S., at 234, and as the recent spate of literature on government speech subsidies recognizes[13]), there are limited circumstances in which the fear of compromising freedom of thought through compelled subsidies of speech may be realistic. See Part II, *infra*.

(c) The third and final reason for concluding that union expenditure pursuant to agency shop clauses does not involve significant governmental intrusion into First Amendment rights is that the government has very little to do with the matter. In cases such as the present one, the constitutional claim really amounts to the contention that the government may not permit mandatory union financial support as a condition of employment unless the

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[13] See Schiffrin, *supra*, 27 UCLA, at 609, et seq. 622-26; M. Yudof, *When Government Speaks, supra*, 164-173.

government simultaneously imposes strict limitations upon the uses the union makes of the exacted funds. In other words, it is government *inaction* in the form of a declination to regulate private action rather than government action that is at the center of the constitutional issue regarding expenditure of agency shop fees.[14]

State action cases decided since *Hanson, Street,* and *Allen* indicate that it is questionable whether inaction of this variety necessarily gives rise to constitutional considerations at all, even where a government-created monopoly or an entity supported almost entirely by government funds is alleged to be violating constitutional rights. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-58 (1974); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-843 (1982).[15] In light of *Hanson's* holding that the RLA's *preemption* of state law is government action that brings the First Amendment into play (351 U.S. at 232), we do not maintain that the indirect nature of governmental involvement in this case demonstrates that there are *no* constitutional constraints on the uses of the money exacted. Rather, the state action cases illustrate that the degree of governmental action, and therefore of constitutional infringement in this situation, is marginal at best, since the actual spending decisions are made by

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[14] *Hanson, supra,* determined that there is state action here with respect to the validity of the union security requirement generally and did not address the issue of state action with regard to the expenditures made by the union. We note that the observation in the text is in large part true as well with respect to the public sector agency shop clauses at issue in *Abood.* There is one level more government involvement in such cases, for an agency of government, as the employer, entered into and stands ready to enforce the agency shop requirement. The expenditures complained of, however, are strictly those of a private entity, the union.

[15] See also *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982):

> [C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. * * * Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.

a private entity, with no governmental involvement (or even any detailed governmental knowledge or approval) whatever.

It is instructive in this regard that this Court recently held that even where the Establishment Clause is invoked,[16] government action of this indirect, passive kind does not amount to establishment of religion. *Mueller v. Allen*, —— U.S. ——, 51 U.S.L.W. 5050 (June 29, 1983), reviewed a private school tax deduction scheme and concluded that "[t]he historic purpose of the [Establishment] clause simply do not encompass the sort of attenuated financial benefit, *ultimately controlled by the private choices of individual parents*, that eventually flows to parochial schools from the neutrally available tax benefit at issue." 51 U.S.L.W., at 5053 (emphasis supplied). Here as well the spending choices are in no sense dictated by the government. Yet, petitioners would ascribe to the government, and then decry as government compelled affirmation of belief or establishment of ideology subject to strict First Amendment scrutiny, these purely private choices. *Mueller* suggests to the contrary, that, at the very least, the lack of involvement of the government in the actual spending decisions significantly decreases the extent to which there is a real danger of government-imposed uniformity of thought or belief. For this reason as well, a relaxed standard of review is sufficient to isolate those few areas in which First Amendment values are truly implicated.

II. THE *ABOOD* STANDARD PROPERLY PROTECTS THE FIRST AMENDMENT INTERESTS AT STAKE IN THIS CASE

For the reasons just discussed, union use of agency-shop fees over an objection ordinarily does not constitute a significant danger to the system of free expression. Recognizing this, *Abood* concluded "that such interference

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[16] As we have noted (p. 17, *supra*) this Court has rejected the conclusion that the free speech provisions contain an implicit anti-establishment principle.

as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," and determined that unions may constitutionally expend enacted fees even over objection "'[a]s long as they act to promote the cause which justified bringing the group together.'" *Abood*, 431 U.S., at 222-23, *quoting Street*, 367 U.S., at 778 (Douglas, J., concurring). On the other hand, when a union spends money on the campaigns of political candidates, or on ideological expenses unrelated to bargaining, *Abood* held, the union goes beyond "the cause which justified the group together" (*id.*, at 234); in those circumstances, even the relatively minimal compromise of constitutionally-protected communicative interests that occurs cannot be sanctioned.

1. This focus on the "cause which justified bringing the group together" reflects an appropriate touchstone not only in union security situations, but in the broader range of circumstances in modern society in which government requires a group of individuals with some common role or affiliation (including a geographical one) to support financially activities centering on that common factor. As Justice Douglas recognized in his concurrence in *Street* (upon which the *Abood* majority relied, 431 U.S., at 223), often, "in an industrial society . . . an association with others is compelled by the facts of life." 367 U.S., at 775-776 (Douglas, J., concurring). Thus, lawyers in a state, students in a state university, and employees in an industry constitute a "latent" group—*viz.*, "a number of individuals with a common interest" (M. Olson, *The Logic of Collective Action* (1964), at 8)—whether or not the individuals are bound to a formal organization. And there are economic circumstances in which the members of the "latent" group will not support, unless required to do so, a formal entity, democratically controlled, devoted to forwarding the group's common interests. The reason is that the effects of certain expenditures (called "public goods" or "collective goods" or "social wants") cannot be limited exclusively to those

willing to pay; a group of individuals similarly situated in some manner will be affected whether or not they choose to contribute to the cost (and even if they believe the expenditure to be against their own needs, desires or beliefs):

> Because one cannot economically be excluded from the benefits of a public good once it has been provided, * * * [a]ny potential buyer would refuse to pay anything like what the commodity is worth to him. Indeed, he would be likely to express an unwillingness to pay anything at all for it. * * * However, if each buyer reasons this way (and presumably he will), the good will not be provided. Public goods will only be provided if collective action * * * is taken. . . [(R. Haveman, *The Economics of the Public Sector* (1970), 25-26, 42-43).] [17]

Labor unions exist primarily to take such "collective action", thereby providing economic benefits to similarly-situated groups of employees:

> A labor organization works primarily to get higher wages, better working conditions, legislation favorable to workers and the like; these things by their very nature ordinarily cannot be withheld from any

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[17] Examples of "public goods" include "a flood control project, the more general benefits of which accrue to an entire region; a sanitary campaign that raises the general level of health throughout an area; expenditures for the judiciary system what secure internal safety and enforce contractual obligations; on protection against foreign aggression. . . ." R. Musgrave, *The Theory of Public Finance* (1959), 9-10.

It is important to note that some individuals are likely to have strong views on the desirability of any "public good." For example, some Americans viewed the Vietnam War as a precautionary measure constituting "protection against foreign aggression;" others as an entirely unjustified war of aggression on the part of the United States. Those in the latter group were *not* free legally to refuse to pay some or all of their federal tax bill because of their disagreement with national policy, as the federal courts had many occasions to hold. *See, e.g., Graves v. Commissioner of Internal Revenue*, 579 F.2d 392 (6th Cir. 1978); *Lull v. Commissioner of Internal Revenue*, 602 F.2d 1166 (4th Cir. 1978).

particular worker in the group represented by the union. Unions are for "collective bargaining" not individual bargaining. It follows that most of the achievements of a union, even if they were more impressive than the staunchest unionist claims, could offer the rational worker no incentive to join; his individual efforts would not have a noticeable effect on the outcome, and whether he supported the union or not he would still get the benefits of its achievements. [M. Olson, *The Logic of Collective Action, supra*, at 76.] [18]

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[18] This observation, it should be noted, is not true only with regard to those union expenditures which are *necessary* to collective bargaining, or within the statutory duty of fair representation. While petitioners, for example, may disclaim any interest in the internal communications system or the external organizing efforts of BRAC, these activities inevitably influence the effectiveness of the union in its role as bargaining representative; nonmembers are not excluded under the RLA from the benefits attributed to a union's so-called "institutional" expenditures, and such *effects* are, in any event, merged into the final bargaining results so that they cannot be isolated in any reasonable way.

Moreover the economic "free rider" problem exists as well when the union acts to further the cause that brings the group together by means other than through the bargaining process—for example, in championing "legislation favorable to workers." *See* Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations On the Uses of Union Shop Funds*, 14 U.C. Davis L. Rev. 591, 603 (1981):

> When a union is unable to obtain a particular concession through bargaining, it often seeks the same concession through the political process. If, for example, a union representing state employees negotiated an improved pension plan with the employer, all represented employees would receive the benefit. Those who did not financially support the union's efforts would be "free riders." If, instead, the union obtained the same pension plan improvement directly from the legislature as a result of lobbying efforts, and represented employees who did not support the union's efforts would be "free riders" in that situation as well. In both examples, the non-paying employees would have received a benefit paid for by the other employees' union dues.

Since, in such circumstances, "everyone knows that his benefit will be independent of his particular contribution . . . compulsion is called for. . . ." R. Musgrave, *The Theory of Public Finance, supra*, at 10. However,

> In a democratic society, the decision to satisfy one or another social want cannot be imposed in dictatorial form: It must be derived, somehow, from the preferences of the individual member of the group . . . *A political process must be substituted for the market mechanism, and individuals must be made to adhere to the group decision.* [*Id.*, at 10-11 (emphasis supplied).]

Thus, the economic circumstances which give rise to governmental taxation, to integrated bars, to compelled student fees, and to the agency shop are basically the same.[19] And in each instance our society goes no further than to require financial support, while assuring that the individual is free to register his views and preferences in ways other than the inappropriate market mechanism of refusing to pay.

Consequently, there is a strong justification for governmental required financial support in such circumstances. And precisely because of the nature of the governmental interest, there is ample reason for refusing to permit individuals to exempt themselves from defraying the expenditures that rationally further the group's common

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[19] It is true that "[i]t may seem strange to draw an analogy between the union and the state." M. Olson, *The Logic of Collective Action, supra*, at 50. But in terms of the interests implicated, it is hard to pereceive why there is

> less infringement of a "right" through taxation for the support of a police force or a judicial system [than through union security provisions.] . . . Of course, law and order are requisites of all organized economic activity; the police force and the judicial system are therefore presumably more vital to a country than labor unions. But this only puts the argument on the proper grounds: do the results of the unions' activities justify the power that society has given them? *Id.* at pp. 88-91.

interest—in this circumstance, their interests as employees. For the very basis for required financial support is that entirely rational individuals will *not* pay, given the choice, whether or not they disbelieve in the particular group or its efforts; separating conscientious dissenters from those who simply wish to save money while reaping benefits is a formidable task with its own constitutional costs, as *Abood* recognized (431 U.S., at 241). *Cf. United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).[20] Yet, unless the range of possible exclusions is kept very narrow, a failure to conduct an inquiry into the motives of dissenters is likely to undermine the legitimate attempt to require similarly-situated individuals to support common benefits.

2. On the other hand there are, as *Abood* recognized, two limiting circumstances in which even a minimal, indirect or attenuated effect on First Amendment interests is not justified. The first is where the union expenditure is both "ideological" and "unrelated to collective bargaining." As Justice Douglas noted,

> If . . . dues are used . . . to promote or oppose birth control, to repeal or increase the taxes on cosmetics, [or] to promote or oppose the admission of Red China into the United Nations . . . then the group compels an individual to support with his money causes beyond what gave rise to the need for group

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[20] *United States v. Lee* held that even where there is a direct conflict with the First Amendment's religious Free Exercise clause, the government may compel payments to the Social Security system. The reason was that "mandatory participation is indispensable to the fiscal vitality of the social security system," at least if the possibility of individuals opting out became "widespread." *Id.*, at 258. (We note that there is no reason to believe that the result in *Lee* would differ if the government required mandatory participation in a social security system administered by a private organization; indeed, a large part of the social security system—namely, Medicare—*is* administered by private organizations, a practice this Court has upheld. *Schweiker v. McClure*, 456 U.S. 188 (1982).)

> action. [*Street*, 367 U.S., at 777 (concurring opinion).][21]

At the point posited by Justice Douglas, the economic circumstances justifying required financial support from members of a particular "latent" group no longer obtain. The reason is that

> a represented employee who receives an alleged benefit wholly unrelated to employment conditions is no more a 'free rider' than any member of the general public who is similarly benefited. Elimination of 'free riders' in these circumstances would not further the government's interest in maintaining peaceful labor relations. [*Gaebler, supra*, 14 U.C. Davis L.Rev., at 607.]

Since there is no longer any other governmental interest to be served, the situation does come to resemble the compelled affirmation of belief cases in at least one respect: the *only* available governmental justification becomes the illegitimate one in compelling support of ideas in which one disbelieves.[22] Further, expenditures by unions on communications completely divorced from its representational concerns are likely to be both small enough and isolated enough from expenditures to further its representational purposes so as to be deductable without endangering the basic cost-sharing principle.

The second narrow category of expenditures *Abood* excepted from the union shop obligation is political candidate campaign expenses. A candidate, even one who has

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[21] The "cosmetics" example, in our view, presents a marginal situation with regard to employees in the cosmetics industry. Such a tax could have a close relationship to such employees' employment situation.

[22] We note once again that where the union acivity in question in no real sense involves ideological or political communication (as, for example, death benefits and social activities), even this factor does not obtain, and there is (as *Abood* recognized in limiting its protections to unrelated *ideological* expenses) no basis for First Amendment protection.

taken positions similar to the group's positions on issues that directly affect the group, cannot be bound to forward the interests of those who support him, and will surely be called upon while in office to act upon matters having nothing to do with that group's interests. Thus, campaign contributions entail by necessity a substantial *spill-over* effect onto issues as to which the group has no common interest whatever.

In addition, and perhaps more important, the First Amendment interest in autonomy in candidate contributions[23] involves different concerns than apply with respect to any other form of communication. "The constitutional [free speech] guarantee has its *fullest and most urgent* application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (emphasis supplied). The reason of course, is that the election process is the base for our entire democratic system:

> [N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process, nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. [A. Bickel, *The Least Dangerous Branch* 16 (1962).]

To give the government any authority to encourage the involuntary aggregation of political campaign support is to distort, in at least a symbolic way, the basic precept of free majority consent from which the remainder of democratic theory—including the principle of deference to legislative decisionmaking on such questions as the best way to achieve industrial peace—derives. This heightened sensitivity to any official governmental intervention in the balance of partisan political power is the

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[23] It is not clear whether *Abood* permits individual employees to decline to pay *any* expenses associated with political campaigns, including registration-get-out-the-vote drives, nor does this case present any question concerning the scope of the *Abood* political candidate exception.

reason, it appears, why "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Board of Education v. Pico*, 457 U.S., at 870-71; *see also id.*, at 907 (Rehnquist, J., dissenting) ("I can cheerfully concede . . . this . . . extreme example[]"). It is also the reason why the otherwise diverse recent commentary on government speech issues is unanimous in depicting direct, unambiguous candidate support as the one area definitely off limits for the government. Schiffrin, *supra*, 27 UCLA, at 613, 622 et seq.; M. Yudof, *When Government Speaks, supra*, at 170-173; T. Emerson, *The System of Freedom of Expression* (1970), at 699 ("[T]he government would not be empowered to engage in direct support of a particular candidate for office. It is not the function of government ~~*pression* (1970) at 699 ("[T]he government would not be~~ to get itself relected.' ").

It was in recognition of this special concern for the integrity of the electoral process, it appears, that *Street*, *Allen* and *Abood* recognize the constitutional interest in autonomy in candidate campaign participation as one necessitating special protection.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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No. 82-1150

IN THE

Supreme Court of the United States

October Term, 1982

HOWARD ELLIS, *et al.*,

Plaintiffs-Petitioners,

vs.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *et al.*,

Defendants-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE STATE BAR OF CALIFORNIA AS AMICUS CURIAE.

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Defendants-Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN NO. 82-1150.

The State Bar of California is a unified bar created by the California Legislature and the voters of California. It is one of a number of unified state bars in the United States.

The California State Bar, as a movant, has sought consent of the partis set forth as Petitioners and Respondents in this case. Counsel for Respondents have not responded to our requests for consent to the filing of the brief. Counsel for Petitioners consented to the filing only upon the condition that the State Bar perform certain acts which it is not authorized by law to perform. *See* letter attached to this application as Exhibit 1. Therefore, this application for leave to file the brief *amicus curiae* attached to this motion is presented under Rule 36 of the rules of this Court prior to the expiration of the filing dates for the briefs of the parties

being supported herein.

Movant seeks to submit this brief *amicus curiae* to invite the Court's attention to the differences between unified bars and labor unions, and to seek to have the Court confine its decision in the case presently pending to labor unions, so that the different issues involved in the unified bar context may be decided directly on their merits by this Court. The refusal of Petitioners to give consent illustrates the need for the State Bar to file this brief, as it indicates that a decision of this Court that is not limited to the union situation would be followed by an attack on the unified bars based on that decision.

Movant also seeks by this brief to support the position of Respondents, upholding the principles of Court of Appeal's broad grant of authority to organizations, as the State Bar feels that such broad authority is necessary and, at the same time, fully protects the rights of minority members of organizations.

Accordingly, movant respectfully requests that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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Defendants-Respondents.

BRIEF OF THE STATE BAR OF CALIFORNIA AS AMICUS CURIAE.

Interest of the Amicus Curiae.

This case presents the question of which union activities may be funded using mandatory fees or dues imposed pursuant to valid union shop and agency shop agreements. The Ninth Circuit set forth rules for that allocation for the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) in *Ellis v. BRAC*, 685 F.2d 1065 (9th Cir. 1982). The Court's decision, however, if not narrowly drawn, could have an adverse impact in fields outside of the specialized union area, specifically on First Amendment challenges to unified bars which are pending in a number of state courts[1] and are likely

[1]A listing of cases presently pending challenging unified state bars is attached as Appendix A.

to reach the Supreme Court by petition for certiorari.

The State Bar of California ("State Bar") is a unified bar created by the California Legislature and the voters of California. Its existence and activities are authorized, and clearly limited and controlled, by constitutional and statutory provisions. (Cal. Const. Art. VI, § 9, Bus. & Prof. Code §§ 6000, *et seq.*) It is a public corporation of the State of California. *State Bar of California v. Superior Court*, 207 Cal. 323 (1929). Fees payable by California lawyers as a condition to practice are set by statute.

Article VI, § 9 of the California Constitution provides that all persons admitted and licensed to practice law in California shall be members of the State Bar, with the exception of judges. Membership is divided into two classes: active and inactive.[2] As of January, 1983, there are 77,320 active and 8,246 inactive members.

California statutes expressly authorize the State Bar to engage in the following activities, *inter alia*: advancement of the science of jurisprudence;[3] improvement of the administration of justice;[4] promotion of relations of the bar with the public;[5] advancement of the professional interests of the members of the State Bar;[6] and performance of actions necessary to the administration and purposes of the State Bar.[7]

The purpose of this *amicus curiae* brief is to invite the Court's attention to the difference between unified bars and labor unions and to respectfully request that the Court narrowly limit its holding in the instant case so as not to ad-

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[2]Bus. & Prof. Code § 6003.
[3]*Id.* at § 6031.
[4]*Id.*
[5]*Id.*
[6]*Id.*
[7]*Id.* at § 6001.

versely affect the ultimate determination[8] of the permissible scope of activities of unified state bars.

I.
INTRODUCTION AND SUMMARY OF ARGUMENT.

The legal and factual distinctions between private organizations, such as labor unions, and public corporations, such as *amicus*, require different analyses in determining the scope of activities which may be financed with compulsorily obtained funds. There are presently pending cases which raise this issue in the unified bar context, which must be decided on their own merits, rather than by implications drawn by lower courts from a decision of this Court in an arguably analogous area of the law. Therefore, *amicus* respectfully requests this Court to limit its decision in the case now pending before it to the difficult questions raised in the labor context, reserving the issue of unified bars to a case which fully presents the substantial and unique issues raised in that context alone.

II.
ARGUMENT.

A. Unified Bars Are Governmental Entities Organized to Serve the Public.

The concept of a unified bar survived constitutional challenge in *Lathrop v. Donahue*, 367 U.S. 820, *reh'g denied*, 368 U.S. 871 (1961). There, a plurality of the court ruled that freedom of association was not violated by requiring a lawyer to pay his share of the cost of elevating the educa-

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[8]Should this Court decline to so narrow its decision, however, *amicus* respectfully suggests that the principles applied by the court below preserves the proper balance between authorized actions approved by a majority of an organization's membership and the rights of a dissenting minority. A more restrictive approach would unnecessarily restrain the ability of the organization to function in the best interests of its membership and, in the unified bar context, in the public interest.

tional and ethical standards of the bar so as to improve the quality of legal services available to the public.

This honorable Court in *Lathrop* left open the question of the manner in which mandatory fees could be used without violating the First Amendment rights of members of unified bars. This question must be faced squarely, as it has been raised in the various cases challenging the constitutionality of unified state bars listed in Appendix A. Although the analogy to the rationale of the union cases is attractive, as mandatory payments by dissenting members are involved in each, *amicus* respectfully asserts that the analogy is inappropriate. There are fundamental distinctions between the organizations involved and the purposes for which they are established; those fundamental differences mandate a different analysis of the problems involved.

Unified bars, including *amicus*, are public entities created either by rule of Court, or by legislative or constitutional authorization. *Amicus*, the California State Bar, is a public agency of the State of California authorized by the Legislature, Bus. & Prof. Code §§ 6001, *et seq.*, and the California Constitution, Article VI, § 9. It serves governmental functions delegated to it by the Constitution, the Supreme Court, and the Legislature. *State Bar of California v. Superior Court, supra*, 207 Cal. 323. Its functions are explicitly and implicitly authorized in detail by the Legislature.

The Bar, through this establishing authority, is instructed to undertake substantial duties in the public interest and to improve the administration of justice. Bus. & Prof. Code § 6031. In California, there has been a fifty-five year history of performance of these public duties and responsibilities by the State Bar.

B. Labor Unions Serve Private Economic Interests.

In contrast to the unified bars, labor unions primarily serve the limited economic interests of their membership, rather than the broad public interest. A union is a private

organization serving private interests.

The union shop or agency shop situation, in which a union is entitled to collect dues or fees from those who would not voluntarily be members of the union, has, as its central purpose, protection of union members from "free riders." The elementary principle of fairness involved is the prevention of benefit without payment; since the union must represent all of the employees in the bargaining unit (N.L.R.A., 29 U.S.C. § 159a), nonmembers would benefit to the same degree as members from union activities, but, in the absence of these provisions, they would benefit without payment. *See, e.g., NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41 (1963) ("[I]n the absence of a union security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.' "); *Radio Officers Union v. NLRB*, 347 U.S. 17, 41 (1954). *See also* Hopfl, *The Agency Shop Question*, 49 Corn. L.Q. 478 (1964) ("[t]he nonmember has, and always will, accept the gains obtained by the bargaining agent for him and he cannot complain if he is called upon to bear his share of the expense").

In contrast, the purposes of a unified bar, and the concomitant mandatory fees it receives, are quite different. The unified bar is the vehicle through which lawyers fulfill their obligations to themselves, the courts, and the public. Whereas mandatory dues set by a union are set within the context of its private organizational needs, the mandatory fees paid by the members of the State Bar of California are set by the California State legislature after consideration of the programs and activities proposed by the State Bar. The California fees are thus a tax the use of which is limited only by state and federal limitations upon expenditure of public funds.

Further, in the bar situation, there is no infringement upon the democratic process in the determination of expenditures. Whereas nonmembers forced to pay union dues lack any opportunity to influence a union's expenditures for causes to which they are opposed, members of unified state bars, which are public entities embodying representative democracy, are ensured of the opportunity to voice their opinion through that democratic process.

III.
CONCLUSION.

For the reasons outlined in this *amicus curiae* brief, *amicus* the State Bar of California respectfully requests this Court to limit its decision in the case now pending before it, and the effect of *Abood v. Detroit Board of Education*, 431 U.S. 209, *reh'g denied*, 433 U.S. 915 (1976), to the labor union context. This would permit the Court to determine the fundamentally different question of the unified bar within the context of its own facts. Because the Court will be presented with such a case within the near future, *amicus* respectfully suggests that a narrow decision is critical in the case at bar. *Amicus* also respectfully suggests that, in the union context, the principles applied by the court below be approved.

Respectfully submitted,

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APPENDIX A.

Pending Challenges to Unified Bar Associations.

1) *Puerto Rico.*

Robert E. Schneider, Jr., et al. v. Colegio de Abogados de Puerto Rico, et al., U.S.D.C. Dist. of Puerto Rico Nos. 82-1459, 82-1513, 82-1514, 82-1532. Decided June 16, 1983.

This suit was brought on June 9, 1982, challenging, *inter alia*, the use by the Puerto Rico Bar of mandatory bar dues and funds derived from required fees for notarial and "forensic" stamps, for alleged political and ideological purposes. The complaint sought declaratory and injunctive relief in addition to damages.

The District Court enjoined the Bar from taking any action against any member of Colegio for failure to pay membership dues or failure to pay notarial and "forensic" stamp fees, and awarded plaintiffs damages of $1. Defendants filed an appeal in the First Circuit of the U.S. Court of Appeals on August 4, 1983.

2) *Michigan.*

Falk v. State Bar of Michigan, 411 Mich. 63, 305 N.W.2d 201 (1981).

A member of the State Bar of Michigan filed a Petition for Special Relief in the Michigan Supreme Court in 1977, requesting that he not be required to pay that portion of his mandatory bar dues which is used by the Michigan Bar to finance certain activities to which he objects.

By *per curiam* decision filed April 29, 1981 the Court stated that it had been unable to reach a majority decision on the matter and ordered that a master be appointed to conduct an additional evidentiary hearing. Pursuant to that

order, additional hearings were conducted after which the master submitted findings of fact and recommendations to the Supreme Court. The matter remains pending.

3) *Florida.*

The Florida Bar Re Amendment To Integration Rule (Supreme Court of Florida No. 61,424).*

In November 1981, 25 members of the Florida Bar petitioned the Supreme Court of Florida requesting the Court to amend the Florida Bar Integration Rule so as to prohibit the Board of Governors of the Florida Bar from engaging in political activity on behalf of the Florida Bar. In addition to the rule change, the petitioners also requested that the Court enjoin the Board from spending 1981-82 budgeted funds for "political activities." The matter remains pending.

4) *California.*

Keller v. State Bar, Sac.Sup.Ct.Civ. No. 307168; *Grace v. State Bar*, LASC No. C424821.

In two lawsuits, members of the State Bar have challenged the use of mandatory dues for activities to which plaintiffs object, including alleged political activities. The *Keller* plaintiffs sought preliminary injunctive relief, which was denied. Both cases are in the pre-trial stage.

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*The Florida Bar is a unified or integrated bar created by court rule instead of legislative enactment.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF EDDIE KELLER AND WILLIAM CUMERO IN SUPPORT OF PETITIONERS HOWARD ELLIS, et al.

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BRIEF AMICUS CURIAE OF EDDIE KELLER AND WILLIAM CUMERO IN SUPPORT OF PETITIONERS HOWARD ELLIS, et al.

INTERESTS OF AMICI

This brief amicus curiae is submitted on behalf of Eddie Keller and William Cumero pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the clerk of this Court.

Eddie Keller is a California attorney named as a plaintiff in litigation before the California courts challenging the use of mandatory state bar association dues for political and ideological purposes. William Cumero is a public school

teacher in California prosecuting litigation before the California courts challenging the use of compelled agency shop fees for political and ideological activities. In both cases, the litigation is based on this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and on legal arguments stemming from that decision that are contrary to the conclusions made by the court below. This Court's decision in the instant action will have a profound impact on the litigation being prosecuted by Messrs. Keller and Cumero. Due to amici's posture as litigants in related cases, amici hope to bring to this case both experience on the issues before the Court and an indication of the broad ranging impacts that will result from resolution of this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 685 F.2d 1065 (9th Cir. 1982).

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in petitioners' opening brief.

SUMMARY OF ARGUMENT

1. For purposes of testing the constitutionality of government regulation, compelled association through compelled financial support is no different than a prohibition on association. In both cases, First Amendment freedoms of the regulated individual are implicated. To survive constitutional scrutiny, therefore, the regulation must actually advance a compelling governmental interest and be tightly

drawn so as to avoid unnecessary abridgment of First Amendment freedoms.

2. Application of this analysis to the facts of this case demonstrates that the use of compelled fees for the challenged expenditures, such as organizing, cannot withstand constitutional scrutiny.

ARGUMENT

INTRODUCTION

The Railway Labor Act (45 U.S.C. §§ 151, *et seq.*) authorizes employers engaged in interstate rail or air commerce and labor organizations to agree to an agency (or union) shop fee arrangement which requires all employees to become members of that labor organization as a condition of continued employment. 45 U.S.C. § 152 Eleventh. In light of the fact that labor organizations engage in a variety of activities arguably unrelated to "collective bargaining," it is not surprising that this Court has had before it several challenges to the constitutionality of agency shop fee arrangements authorized by 45 U.S.C. § 152 Eleventh and similar state laws. *E.g., Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education, supra.*

In *Hanson*, this Court upheld the facial constitutionality of the agency shop fee provisions of 45 U.S.C. § 152 Eleventh, but withheld judgment on the constitutionality of the use of such fees for purposes not germane to collective bargaining. *Railway Employees Department v. Hanson*, 351 U.S. at 238. This Court held that there were simply no facts

in the record to raise those issues. *Id.* The issue of expending fees for noncollective bargaining purposes was faced by the Court in *Street*. The Court in that case, however, did not decide the constitutionality of such expenditures. *International Association of Machinists v. Street*, 367 U.S. at 749 (plurality opinion). Instead, the Court invoked the doctrine against unnecessary constitutional decisions and held that the Railway Labor Act itself prohibited noncollective bargaining uses of dissenting employees' compelled fees. *Id.* at 749, 768-69. The record before the Court, however, did not provide a basis for determining which expenditures were proper and which were not. *See id.* at 769. Finally, in *Abood v. Detroit Board of Education*, the Court was squarely faced with the constitutionality of agency shop fees and the permissible uses of such fees. The Court held such fees constitutional so long as dissenting employees' fees were expended for purposes germane to collective bargaining, contract administration, and grievance adjustment. *Abood*, 431 U.S. at 225-26. Again, however, the record before the Court was insufficient to determine the types of expenditures that fell within those three categories. *Id.* at 236. It is against this backdrop that the Court is confronted with the instant action—a case that raises the issues left undecided by *Abood* and *Street*.

Amici's purpose in submitting this brief is to suggest to the Court an analytical framework by which the instant case and future similar fact patterns—whether they be agency shop fees or integrated bar dues—may be solved. Once established, such an analytical framework will serve to guide the lower courts in similar litigation and will help this Court to avoid becoming embroiled in a case-by-case

determination of the propriety of each and every possible expenditure made by labor organizations. The decision below, unfortunately, is devoid of such an analytical framework. The court below ignored this Court's holding that allowable[1] expenditures are those germane to collective bargaining, contract administration, and grievance adjustment. Instead, the lower court adopted a much broader and more permissive test of whether the "challenged expenditure is germane to the union's work in the realm of collective bargaining." *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d 1065, 1072 (9th Cir. 1982). The breadth and vagueness of such a test indicate a failure by the lower court to conduct the close and searching scrutiny required by the First Amendment.

I

COMPELLED FINANCIAL SUPPORT OF LABOR ORGANIZATIONS AUTHORIZED BY FEDERAL LAW INFRINGES ON FIRST AMENDMENT RIGHTS TO FREEDOM OF SPEECH AND ASSOCIATION

A successful analytical framework cannot begin with the simple statement that the Court has already ruled on the facial constitutionality of agency shop fee arrangements. Rather, the interests impacted by such arrangements and governmental rationales for allowing them must first be reviewed. At issue is a federal law authorization, and the availability of federal judiciary enforcement, of a contract provision that requires an employee, as a condition of continued employment, to pay to the exclusive representative

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[1]The term "allowable expenditures" is used here to mean those expenditures that are constitutionally allocable to dissenting employees.

of the employees fees and periodic dues charged to voluntary members. 45 U.S.C. § 152 Eleventh. The governmental involvement of authorization and enforcement is sufficient government action to bring into play the protections of the Federal Constitution. *Abood*, 431 U.S. at 226; *Hanson*, 351 U.S. at 232 n.4. The constitutional interests of the dissenting employee alleged to be implicated by such agreements are the First Amendment freedoms of speech and association.

This Court has recognized that the freedom to associate with others for advancement of ideas and beliefs is "a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). This right of association is exercised not only by joining a group or meeting with others, but also by the act of contributing money to the group. Such a contribution, this Court has noted, serves to affiliate the individual with a group or cause and allows like minded persons to pool their resources to further the cause. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976). A necessary corollary to the freedom to associate with others is the freedom to refrain from such associations.

> "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. [Footnote omitted.] For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35 (citations omitted).

The Court's use of the terms "political" and "ideological" in *Abood* to describe unallowable[2] uses of the dissenters' compelled contribution was not intended to constitute an exhaustive list of proscribed uses of those fees. Indeed, the Court in *Abood* emphasized:

> "[O]ur cases have never suggested that expressions about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. [Footnote omitted.] . . . Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry." *Id.* at 231-32.[3]

This acknowledgment of the breadth of the protections provided by the First Amendment was merely a reiteration of what this Court had noted nearly two decades prior to the *Abood* decision.

> "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ." *National Association for the Advancement of Colored People v. Alabama (NAACP)*, 357 U.S. 449, 460 (1958).

Thus, compelled financial contribution to a labor organization—regardless of the purpose such contributions will be put to—infringes on "fundamental personal liberties." *See Abood*, 431 U.S. at 222; *Kusper v. Pontikes*, 414 U.S. 51, 59

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[2]*See* Footnote No. 1, *supra*.

[3]In spite of this language, the court below apparently fell into the trap of testing whether the contested expenditure could be labeled "political" or ideological. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d at 1068.

(1973); *Shelton v. Tucker*, 364 U.S. at 488. This is not to say that such rights are inviolate. There do exist, as a practical matter in an organized society, governmental interests that will override individual freedoms. *See United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973).

Although it is recognized that the government may occasionally need to override the rights of the individual, any such governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP*, 357 U.S. at 461. It makes no difference whether the government in pursuit of its own interests intended or even foresaw the interference with individual liberties. *Id.* at 461. To survive the required "closest scrutiny," the governmental interest must be compelling. *Id.* at 464. Even with a compelling justification, the government must do all that is possible to avoid injury to First Amendment rights.

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton*, 364 U.S. at 488 (footnotes omitted). *See Kusper v. Pontikes*, 414 U.S. at 59.

Thus, although compelled payment of an agency shop fee violates the dissenting employees' First Amendment rights to freedom of speech and association (*see Abood*, 431 U.S. at 222), these rights can be subordinated in the face of a

compelling governmental interest (*see id.* at 224). The means of achieving that interest, however, must be narrowly drawn to avoid unnecessary infringement of fundamental personal liberties. *Shelton*, 364 U.S. at 488. This Court has determined that the maintenance of labor peace and stability is a compelling governmental interest. *See Abood*, 431 U.S. at 224-25. This interest is advanced through the selection of an exclusive agent to bargain on behalf of the employees in the unit. *See id.* at 224. Maintenance of labor peace and stability requires that all who share in the benefits obtained by the exclusive representative also share in the costs incurred in gaining those benefits. *See id.* This is not to say, however, that the dissenting employee must contribute to *all* costs incurred by the exclusive representative. Application of the least drastic means test commands that the dissenting employee be required to contribute only to those costs of the exclusive representative that actually advance the compelling governmental interest of labor peace and stability. Thus, as this Court implied in its *Abood* decision, the dissenting employee should only be required to contribute his or her pro rata share of the costs of "collective bargaining, contract administration, and grievance adjustment . . . ." *Id.* at 225-26.

II

APPLICATION OF THIS ANALYTICAL FRAMEWORK TO THE FACTS OF THIS CASE DEMONSTRATES THAT THE USE OF COMPELLED FEES FOR THE CHALLENGED EXPENDITURES, SUCH AS ORGANIZING, CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY

As noted above, the lower court rejected this Court's *Abood* holding that agency fees are constitutional insofar as they are expended for "collective bargaining, contract administration, and grievance adjustment." *Abood*, 431 U.S. 225-26. Instead, the lower court adopted a much broader test:

> "[W]e believe that the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 685 F.2d at 1072.[4]

Aside from the failure to follow this Court's decision in *Abood*, the lower court's overly broad formulation demonstrates its utter failure to engage in close and exacting scrutiny and to apply the least drastic means test to the expenditures at issue. The lower court's analysis of the expenditures for recruiting and organizing is indicative of this failure.

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[4] A reading of the lower court's majority opinion reveals that that court's use of the term "collective bargaining" not only subsumes this Court's tripartite formulation of "collective bargaining, contract administration, and grievance adjustment," but also every other conceivable activity of a labor organization with the exception of partisan political activity. *See id.* at 1072 n.5.

The sum total of the lower court's analysis of expenses for organizing is contained in the following three sentences:

> "Maximum organization of an industry benefits employees and units already organized. A union is considerably strengthened if it eliminates competition from non-union employers and a stronger union is unquestionably a more effective collective bargaining agent. Successful organizing efforts thus can strengthen the union's position at the collective bargaining table immeasurably." *Id.* at 1074.

That such analysis is overly simplistic is demonstrated by the breadth of the issue that was actually before the court. At issue was:

> "'(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.
>
> "(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:
>
> "(a) employees not employed by Western Airlines;
>
> "(b) employees not employed in the air transportation industry;
>
> "(c) employees not employed in other transportation industries.'" *Id.* at 1075. (Whelan, J., dissenting).

Each of these challenged recruiting activities must be scrutinized with regard to whether they advance the compelling interest of labor stability. Such scrutiny reveals that challenges to each of these expenditures must be sustained.

In *Abood,* this Court noted that the governmental interest of labor peace and stability is served by a system of

exclusive representation and a cost sharing scheme that ensures the exclusive representative will be able to carry out its duties to represent fairly all employees in the unit. This interest is obviously *not* served by requiring the dissenting employee to contribute to the cost of membership drives within the bargaining unit. Since all employees in the unit are already required to pay an agency fee, any *additional* financial benefit gained by the labor organization by reason of acquiring new members, by definition, would not go to support activities in furtherance of the proffered governmental interest. Instead, such additional financial resources would be used to carry on activities the dissenting employee could not constitutionally be compelled to finance.

Similarly, organizing and recruiting employees of other employers and employees in unrelated industries cannot be said to advance the stated governmental interest. The lower court's simplistic approach speaks in terms of eliminating "competition from non-union employers." *Id.* at 1074. In point of fact, however, labor organizations do not compete with "non-union employers," they compete with "non-union" employees. Such competition does nothing to further the governmental interest of maintaining an exclusive representative. Whether or not employees in other industries belong to the same labor organization simply has no bearing on the organization's duties as the exclusive representative. Thus, to compel dissenting employees to contribute to the cost of a labor organization's organizing and recruiting activities would violate the employees' First Amendment rights to freedom of speech and association.

CONCLUSION

To compel an employee to contribute to a labor organization infringes on the employee's First Amendment rights to freedom of speech and association. This infringement can be justified, however, in the instance of a compelling governmental interest. Even when the governmental interest is compelling, that interest is subject to a "least drastic means" analysis to ensure that fundamental personal liberties are not unnecessarily infringed. In the case of employer-employee relations, the compelling governmental interest of labor peace and stability is promoted by ensuring that the exclusive collective bargaining representative has sufficient resources to carry out its duties. The least drastic means of furthering this interest is to allow compulsion of all employees to contribute to the costs of bargaining, contract administration, and grievance adjustment. To compel dissenting employees to contribute to any other activity of the labor organization goes beyond the governmental interest involved and violates the employees' First Amendment rights to freedom of speech and association.

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NO. 82-1150

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HOWARD ELLIS, ET AL.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

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HOWARD ELLIS, ET AL.,
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V.
BROTHERHOOD OF RAILWAY, AIRLINE
AND STEAMSHIP CLERKS, ET AL.,
RESPONDENTS

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in Internal Revenue regulations. It is located on the campus of the South Texas College of Law in Houston and shares personnel and activities with the law school.*

LFA's goals include preservation of the market system of resource allocation, attainment of a better balance between the federal government and the States, furtherance of individual political freedom, and preservation of a rational system of criminal justice. In pursuit of its aim to enhance the function of the market system, LFA has frequently appeared as amicus curiae in

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* Amicus curiae wishes to acknowledge, with thanks, the assistance of law student Susan Laurea in the preparation of this brief.

cases involving labor issues both in this honorable Supreme Court and in lower courts. It has also frequently appeared in cases involving the freedoms of speech and association. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

SUMMARY OF ARGUMENT

Respondents maintain that the challenged union expenditures are constitutional because they are "germane to" collective bargaining. Amicus curiae submits, however, that the "germane to" test used below to determine the constitutional validity of such expenditures is not the appropriate standard. Instead, when fundamental rights are infringed, strict scrutiny is necessary. Such analysis requires that a "compelling" interest of government be shown to be actually furthered by the government policy. Furthermore, the interference must be shown to be "narrowly targeted" to achieve the governmental interest in question.

Under this analysis, collective bargaining, contract administration, and grievance processing are arguably constitutional uses of compulsory union fees, because they are narrowly targeted to advance the compelling interest in unobstructed commerce, which is the overarching goal of national labor legislation. The union shop as authorized by sec. 2, Eleventh of the Railway Labor Act is thus not a "compelling" end in itself; it is merely a means of funding these essential functions without "free riders." But forcing dissenting workers to support controversial ideas through diffuse "public interest" litigation, magazines, or social functions, on the theory that such dissenters would otherwise get a "free ride" on expression with which they disagree in the first place, is not narrowly targeted to support any compelling interest.

PRELIMINARY STATEMENT

Amicus curiae agrees with petitioners that the Railway Labor Act itself prohibits the expenditures in question. Amicus here deals only with the constitutional issues in order to avoid

duplication of petitioners' arguments. Amicus stresses, however, that it may not be necessary to reach this analysis, since it is submitted that the statute should be interpreted to reach the same result.

I. COMPULSORY SPEECH OR ASSOCIATION MUST BE "NARROWLY TARGETED" TO ADVANCE A "COMPELLING" GOVERNMENTAL INTEREST. ALTHOUGH COLLECTIVE BARGAINING ACTIVITIES ARGUABLY MEET THIS TEST, OTHER KINDS OF FORCIBLY FUNDED SPEECH AT ISSUE HERE DO NOT.

A. *Strict Scrutiny is Required.*

This case involves the right of association and the right to refrain from supporting speech with which one disagrees. These are fundamental rights.[1] A mass of cases decided by this Court

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1 In NAACP v. Clairborne Hardware Co., 102 S. Ct. 3409, n. 80 (1982), this Court quoted de Tocqueville in designating the right of association "one of the most natural privileges of man." See also NAACP v. Alabama, 357 U. S. 449 (1958); Brown v. Socialist Workers '74 Campaign Committee, 51 U.S.L.W. 4015 (U. S. S. Ct. 1982). Furthermore, the "[f]reedom to associate carries with it a corresponding right to not associate." Good v. Washington, 86 Wash. 2d 94, 542 P. 2d 762, 766 (1975). With respect to the right not to speak (or to refrain from supporting speech with which one disagrees), Board of Education v. Barnette, 319 U. S. 624, 642 (1943), holds as follows:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." Id. at 642.

See also Wooley v. Maynard, 430 U. S. 705 (1977).

Recently, the right to refrain from associating has been extended to such contexts as political patronage schemes, mandatory student service fees, and compulsory state bar dues used to subsidize controversial expression. See notes 2, 8-9 infra and accompanying text.

requires that any infringement of these rights be supported by a "compelling" governmental interest.[2]

Furthermore, the infringement must be "narrowly targeted" to advance the compelling interest in question.[3] Mere "relationship" to a governmental objective is not enough.[4] The compul-

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2 " '. . . this type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arise, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . . '. Buckley v. Valeo, 424 U. S. 1, 65 (1976). Thus, encroachment 'cannot be justified upon a mere showing of a legitimate state interest but must be justified upon an interest that is shown to be paramount and one that is of vital importance to the state.' Kusper v. Pontikes, 414 U. S. 51, 58 (1973). Furthermore, the burden is on the government to show the existence of such an interest and 'the government must employ means closely drawn to avoid unnecessary abridgment.' Buckley v. Valeo, 424 U. S. 1, 94 (1976)."

Elrod v. Burns, 427 U. S. 347, 362-63 (1976). In Elrod, this honorable Supreme Court struck down a patronage system in which employment was conditioned upon political party membership.

3 This requirement has been stated in several equivalent formulations, requiring means "closely drawn," or "tailored," or "necessary," or "least restrictive," to achieve the compelling interest. See note 2 supra and authorities therein cited; see also authorities cited in note 1 supra and notes 8-9 infra.

Perhaps the best illustration of this "narrow targeting" requirement is to be found in Regents v. Bakke, 438 U. S. 265 (1978), which, although it deals with racial classifications rather than with expression, involves the same principle. School admissions providing diversity in the student body could be said to involve a "compelling" interest, but the "quota" plan was too broad; the Harvard plan, in which racial diversity could be considered as one factor, was validated as more closely drawn to serve the compelling interest at issue.

4 "[E]ncroachment [on fundamental rights] 'cannot be justified upon a mere showing of a legitimate state interest.' " Elrod v. Burns, 427 U. S. 347, 362-63 (1976), citing Kusper v. Pontikes, 414 U. S. 51, 58 (1973).

sion must be tailored to, or "narrowly targeted" to meet, the compelling interest that is its objective, if it is to infringe fundamental rights and still be constitutional.

While this honorable Court has not found it necessary to consider this "narrowly targeted compelling interest" test in prior labor decisions such as Abood, Street, and Hanson,[5] the issue is squarely raised here. The respondent union maintains that any expression "related to" its union functions, or benefitting it or enlarging its power, can overcome dissenters' speech or associational interests and justify compulsory financial support.[6] The Ninth Circuit held that anything "germane to the

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5 Abood v. Board of Education, 431 U. S. 209 (1977); International Ass'n of Machinists v. Street, 367 U. S. 740 (1961); Railway Employees' Dep't v. Hanson, 351 U. S. 225 (1956).

The Court was able to resolve each of those cases without directly deciding whether strict scrutiny was appropriate in the context at bar. The present case is the first in which the issue has been unavoidably presented.

In Abood, Mr. Justice Powell wrote separately to point out that the constitutional issue, if confronted, would require strict scrutiny:

> Under First Amendment principles that have become settled since Hanson and Street were decided, it is clear that . . . the [proponent] should bear the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests . . . .
>
> I would adhere to established First Amendment principles and require the state to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled [payment] is necessary to serve overriding governmental objectives. This placement of the burden of litigation, not the Courts', gives appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important.

Abood v. Board of Education, supra, 431 U. S. at 255, 263-64 (separate opinion of Mr. Justice Powell).

6 Thus respondent has, throughout this litigation, supported such "Paragraph 22" expenditures as magazines, conclaves and "public

union's work in the realm of collective bargaining" could overcome these fundamental rights.[7] Such diffuse reasoning is inconsistent with the requirement of "narrow targeting" to advance a "compelling" interest, the test this Court has consistently applied to infringements of speech or association.

In other kinds of membership cases, such as those involving dues for integrated bar associations, compulsory student fees at universities, and like exactions, the courts have applied the strict scrutiny approach to the use of monies for controversial expression. For example, in Falk v. State Bar,[8] a plurality of the Michigan Supreme Court limited the use of bar dues supporting controversial expression to the least restrictive means necessary to serve compelling governmental interests. The New Mexico federal district court reached a similar result in Arrow v. Dow.[9] In Galda v. Bloustein,[10] the Third Circuit used strict-scrutiny analysis to invalidate use of compulsory student fees to fund a "public interest" corporation engaged in litigation and public education activities very similar to some at issue here.

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interest" litigation on the theory that these expenditures are "rationally related" to one of the "central purposes of national unions," namely, "to enhance . . . the strength" of all unions by "maximum organization of the industry." See CR 155 at 176.

7 Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 685 F.2d 1065, 1072 (9th Cir. 1982).

8 411 Mich. 63 (1981).

9 544 F. Supp. 458 (D. N. M. 1982). The New Mexico Bar Association had used dissenting members' dues to fund controversial lobbying including stands against continuing education requirements for lawyers, in favor of Mental Health Code amendments, and in favor of millions of dollars of additional funding for prosecution and defense offices. The district court used the compelling interest test to strike down these expenditures.

10 686 F. 2d 159 (3rd Cir. 1982). Cf. Good v. Associated Students, 86 Wash. 2d 94, 542 P. 2d 762, 766 (1977).

And in Robinson v. New Jersey,[11] the Court struck down lobbying and other expenses by a union, using first amendment analysis.

B. While the use of compulsory dues to support collective bargaining, contract administration, and grievance processing arguably meets the constitutional test, other kinds of forced expression at issue here do not.

The purpose of the union shop or agency shop (as this Court recognized in Street, supra), is to avoid "free riders."[12] Federal labor legislation requires a union, when it serves as exclusive bargaining agent, to act "fairly and equitably to represent all employees."[13] Individuals are prevented from bargaining for themselves as to matters bargained collectively, when the union is exclusive agent. Thus the theory behind Railway Labor Act sec. 2, Eleventh, which is the authority for the union shop, is to reimburse the union for collective bargaining, contract administration, and grievance processing, because federal law imposes these duties upon it and because the theory is that it performs these functions for *all* employees.[14]

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11 547 F. Supp. 1297 (D. N. J. 1982); Accord, Beck v. Communications Workers of America, 1983 Daily Labor Rept. No. 48 at D-1 (D. Md. Mar. 4, 1983) (applying strict scrutiny).

12 The principal argument made by the unions in [urging adoption of sec. 2, Eleventh] was based on their role in this regulatory framework. They maintained that because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the cost to all employees . . . . They thus advanced as their purpose the elimination of the "free riders" . . . .
International Ass'n of Machinists v. Street, 367 U. S. 740, 761-62 (1977); accord, id. at 764 n. 15.

13 Id. at 760-61.

14 Id. See also Id. at 751, 755.

In turn, collective bargaining is an instrument of national labor policy.[15] It is narrowly targeted to serve the arguably compelling interest in maintaining the free flow of interstate commerce. This goal of unobstructed commerce is the overarching purpose of the national labor legislation.[16] The union shop or agency shop is merely a means of funding the collective bargaining process in order to serve this goal.[17] The union shop is not an end in itself.[18]

Other kinds of forced speech argued for by the union, however, do not meet the test. This union used forced dues from dissenters to engage in diffuse kinds of "public interest" litigation, for example. It attempted to change existing law to make unions more powerful. This litigation, however sincerely union presidents may have supported it, was controversial and ideologi-

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15 Id. at 760: "In prescribing collective bargaining [and] in conferring on unions the status of exclusive representatives . . . , Congress has . . . [effectuated] the basic congressional policy of stabilizing labor relations in the industry.

16 The purpose clause of the NLRA declares that "it is the policy of the United States to eliminate [the] causes of obstruction of the free flow of commerce," as paraphrased by this honorable Supreme Court. NLRB v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937). This policy under the Railway Labor Act is even more compelling because of the urgent need to keep trains and airplanes operating.

17 It is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." . . . [W]e construe sec. 2, Eleventh as not vesting the unions with unlimited power to spend exacted money. Street, supra, 367 U. S. at 767-68.

18 Some States do not even allow the union shop (the federal legislation empowers States to decide the issue), and indeed the original Railway Labor Act, enacted in 1934, did not provide for it. Section 2, Eleventh, authorizing the agency shop as a means of funding collective bargaining, was not enacted until 1951.

cal.[19] Dissenters' associational and speech interests are at their strongest when they are forced to support such ideological causes.[20] Furthermore, forced support of such diffuse "public interest" litigaton is simply not "narrowly targeted" to advance the free flow of interstate commerce, nor is it tailored to meet any other "compelling" governmental interest. The mere fact that this forced association may somehow be "related" to or "germane" to the union's own idea of its function should not suffice to overcome the fundamental rights the union thus

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19 The union sued to enjoin airlines' use of a "Mutual Aid Pact" or "strike fund," for example. 685 F.2d at 1073. This litigation was directly opposed to the congressional goal of unobstructed commerce (because it made strikes more likely). Thus the litigation not only was not "closely drawn" to a compelling interest; it was actually harmful to the compelling interest Congress specifically identified as the basis of the national labor legislation. And even if it did have the claimed effect of "strengthening the union's ultimate . . . weapon," Id., this litigation was ideological, political, and controversial in character.

The union also used dissenters' money for litigation to allow it to defend alleged acts of race and sex discrimination in violation of the Civil Rights Act of 1964. Id. Dissenters should not have had to support such litigation.

20 Collective bargaining or grievance processing are, themselves, essentially economic in nature. Arguably, the expression involved in contract negotiations thus has a less "pure" speech aspect to it.

But diffuse "public interest litigation" of the sort engaged in by the union here is strikingly different; it is hard-core ideological expression. Cf. In re Primus, ____ U. S. ____ (1978) (public interest litigation held protected means of speech under first amendment; ACLU lawyer not subject to bar association's antisolicitation rules, and could permissibly solicit clients, because of importance of litigation as a means of political expression).

infringes.[21]

Similarly, the forced use of dissenters' dues to publish magazines on a wide variety of subjects, to hold social functions, or to hold conventions not confined to collective bargaining,[22] is not narrowly targeted to advance compelling interests in unobstructed commerce.

It is important to realize that a compelling interest cannot be found in the broad "union benefit" or "free ride" rationale

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21 "Germane to the union's work in the realm of collective bargaining" is an exceedingly loose term. The "germane to the realm of" approach would presumably approve even actions destructive of collective bargaining. An action need not be "supportive of" collective bargaining to be "germane to" its "realm": actions "threatening," or "removing," or "weakening" collective bargaining are all, by definition, "germane" to its "realm."

This very brief of this Amicus Curiae, for example, is "germane to the realm of" collective bargaining in the same sense. Should those who disagree with this Amicus Curiae be forced to support it, an analogous case to the present controversy would be presented. Leaders of the respondent union may not wish to support this Amicus in this endeavor, and they should not be forced to do so.

22 It is difficult to see how forcing dissenters to fund union social parties is "closely drawn" to promote the "compelling" interest in unobstructed commerce. Dissenters may particularly object to their compelled funding of publications and magazines containing rhetoric, expressed in sometimes harsh and extreme terms, supporting political and ideological goals chosen by the unions, with which these dissenters vigorously disagree. Again, that forced funding is not "closely drawn" to support any compelling interest.

Nor is the union organization of other firms part of the process of collective bargaining that sec. 2, Eleventh was to fund; it is not "closely drawn" to prevent obstruction of commerce. The Court of Appeals said that "[m]aximum organization" had the effect of "eliminating competition" from non-union employers and thus "strengthening" the union. The Court of Appeals seems to have concluded that the purpose of labor legislation was to create the strongest possible union. But unions, in and of themselves, are not a "compelling" interest. They are merely an instrument of industrial policy, allowed to exist so that commerce will remain unobstructed.

asserted by respondents here.[23] Under this notion, anything that might increase the power or authority of unions could justify infringement of speech or association, on the theory that dissenters were somehow benefited by greater union power, albeit against their will. In the first place, evidence in this record shows that the claimed "union benefit" is completely absent. Union shop employees actually earn less, in this industry, than their open shop counterparts.[24] As this honorable Supreme Court said in Hanson, supra, 351 U. S. at 233-34, "powerful arguments" can be made that "long run interests of labor would be better served . . . without the coercive element of the union or the closed shop." The present case forcefully demonstrates the correctness of that observation, because the "union benefit," here, is in actuality a negative quantity.[25]

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23 "BRAC responds that . . . all employees under a union shop or agency fee arrangement should be required to shoulder their fair share of these traditional union activities." Ellis, supra, 685 F. 2d at 1068.

24 Study of Professor Ronald K. Teeples, CR 276 at 37 et seq. Professor Teeples examined eleven domestic trunk airlines during the period 1952 to 1976. He found non-union pay rates higher, across the industry, than union rates. Furthermore, he found this non-union superiority to hold in nearly every job category: "The non-union averages are in nearly every instance higher than the corresponding union averages." Id. He also found that the rate of increases in pay was better for non-union workers: "Again, below average . . . payrate progressions are related to union status." Id. The Teeples study included supplemental benefits as well as such factors as holidays and sick leave. These factors did not change the result, because "lower payrates [i.e., union contracts] tend to have lower supplementary provisions." Id.

In short, there is no "union benefit" here. It was not beneficial to a worker to be in a union shop; it was actually harmful.

25 It can be persuasively argued that superior workers are disadvantaged by the union shop since union efforts to enhance the status of marginal employees must of necessity come at the expense of superior workers' compensation. See Merrill, Limitations on the Use of Compulsory Union Dues, 42 J. AIR L. & COMM. 711, 716 (1976).

But more importantly, while there may be a compelling interest supporting exclusivity of collective bargaining (because it furthers unobstructed commerce), there is no such narrowly targeted, compelling interest that can be asserted to support the diffuse "union benefit" theory. Forcing dissenters to accept putative "benefits" they prefer to reject is not "narrowly targeted" to promote the free flow of commerce. It is not essential to the collective bargaining scheme that Congress set up to achieve this objective.[26] And the imposition of compulsory dues to prevent dissenters from somehow obtaining a "free ride" on [27] diffuse public interest litigation, union magazines, social gatherings and other speech, with which they vehemently disagree in the first place and therefore do not want a "free ride" upon, cannot be said to be narrowly targeted to serve any compelling interest at all.

II. UNLESS ACCOUNTING DUTIES ARE ENFORCED, NO LIMITATION ON UNION USE OF FUNDS FOR IDEOLOGICAL OR POLITICAL PURPOSES WILL BE MEANINGFUL.

The common law has placed a strict duty of accounting upon representatives holding funds for other persons. Thus executors, trustees, attorneys, and fiduciaries, among others, are under obligations of accounting, usually by rigorously prescribed methods. They are limited to certain kinds of usages and are prohibited from self dealing, even in the absence of constitutional issues.[28]

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26 See notes 11-15, supra.

In fact, this sort of coercion is likely to engender hostility in splinter groups that may lead to precisely the kind of obstructions of commerce Congress sought to avoid.

27 See notes 19-20 supra and accompanying text.

28 The union has admitted that it owes plaintiffs "a fiduciary obligation." CR 80 at 31. This obligation includes the duty to account. See, e.g., J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH

It would be ironic if such accounting obligations, which are routinely imposed by the courts at common law, were not required to protect the exercise of the first amendment freedoms at issue here. In fact, any protection of these rights would be illusory without a requirement of accounting, since only the union and its officials could possibly know how it expends the funds of dissenters.

The evidence, here, makes crystal clear the union's commingling of funds for permitted uses with those for restricted uses. Union officials with financial responsibility have testified to the union's inability to separate the categories of expenditures at issue.[29] The union maintains that it can "document" all expenditures in the sense of being able to tell that a given expenditure was made, but the uselessness of this "documentation" becomes apparent when one realizes that it cannot tell what category any expenditure falls into.[30] And no one else can trace

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TRANSACTIONS ch. 14 (2d ed. 1978). A fiduciary has the duty to earmark the beneficiary's property, to avoid commingling, and to preserve and prudently invest the beneficiary's property. Id. The common law has deemed these protections necessary to protect the beneficiary adequately.

29 There is absolutely nobody at the present time that knows where the money has been spent or for what reasons. It is an impossibility under our present system, to know this.
Report of International Union's Secretary-Treasurer, Exhibit 1178, at 36, admitted at RT, Aug. 11, 1978, at 1251. The accounts were called the "standard joke" of the organization. Id. The union's accountants, Haskins and Sells, testified through one of its partners that union records would not permit an accurate calculation of amounts spent for political purposes. Deposition of Russell Wende at 43-44, 48, admitted at RT, Aug. 10, 1978, at 1236-37, 1239.

30 The defendants maintain only that "there are records for every union disbursement," although admitting that the records "are not maintained along [relevant] categories," making them useless for the purpose. Appellee's Brief in Court of Appeals at 46. In short, all that the union can tell is that it has spent the amount of plaintiffs' money reflected by its expenditure records.

the funds, for it is the union that has exacted and expended them.

Even the basic holdings in Street and Hanson cannot be enforced without an obligation to account. The Court of Appeals' acceptance of bare testimony by union officials, which the union admits is unsupported by accounting using any accepted method, should be reversed. Courts other than this Court of Appeals, hearing similar cases, have recognized the significance of the accounting issue and have given it great attention.[31]

CONCLUSION

The kinds of coercion of expression and association at issue here are not "narrowly targeted" to serve the "compelling" interest in free flow of commerce that Congress identified as the goal of national labor legislation. And since fundamental rights of expression and association are infringed, this strict scrutiny approach is the applicable test. The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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31 E.g., Beck v. Communications Workers of America, 1980 Daily Labor Rept. (BNA) No. 166 at D-1 (Aug. 18, 1980) (special master's report), adopted with modifications, 1983 Daily Labor Rept. No. 48 at D-1 (D. Md. Mar. 4, 1983). Robinson v. New Jersey, supra note 11.

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No. 82-1150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HOWARD ELLIS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

ALLEN L. FAILS, *et al.*,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,

Respondents.

BRIEF *AMICI CURIAE* OF MID-ATLANTIC LEGAL FOUNDATION, JOSEPH P. GALDA, THOMAS ODOM, AND THOMAS CARROLL IN SUPPORT OF PETITIONERS HOWARD ELLIS, *ET AL.* and ALLEN L. FAILS, *ET AL.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF THE AMICI CURIAE

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation, Joseph P. Galda, Thomas Odom and Thomas Carroll hereby move the Court for leave to file the attached brief as *amici curiae*. Consent was secured from counsel for both parties. Copies of these letters have been filed with the Court.

Amicus, Mid-Atlantic Legal Foundation (MAtLF) is a nonprofit corporation engaging in nonpartisan legal research, study and analysis for the benefit of the general public concerning the effects of evolving concepts of law on our democratic institutions. Among its functions is to provide legal representation on matters of public interest at all levels of administrative and judicial activity. MAtLF is primarily interested in issues of national scope that have a direct effect on the Mid-Atlantic region, namely, Delaware, Maryland, New Jersey, New York, Pennsylvania and West Virginia.

MAtLF is representing university students in two cases involving issues similar to those presented in the instant case. One of these cases has involved extensive hearings and argument at both the district and circuit court levels. The other has been more recently commenced. Both cases involve the issue of whether the state may extract a mandatory student fee which is then transmitted, directly or indirectly, to off-campus groups alleged to be ideological. These exacted fees are compelled as a condition of matriculation each semester.

Amici, Joseph P. Galda and Thomas Odom are or were students at Rutgers, the State University of New Jersey. Both pay or paid discrete mandatory fees each semester. In this case, the district court granted summary judgment for the defendants on the ground that a procedure for refund existed. *Galda v. Bloustein*, 516 F.Supp. 1142 (D.N.J. 1981). On appeal, the United States Court of Appeals for the Third Circuit reversed, holding that where the entire fee is successfully challenged, a refund

will not cure the otherwise unconstitutional exaction. *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982). The case was remanded and is pending in the district court.

Amicus, Thomas Carroll was a student at a constituent college of the State University of New York. He paid a mandatory, non-refundable student activity fee each semester. The complaint in which he is one of the plaintiffs challenges an identifiable portion of this fee. The case, which is in its early stages, is pending in the United States District Court for the Southern District of New York. *Carroll v. Blinken*, No. 83-1272 (S.D.N.Y. filed Feb. 17, 1983).

The mandatory student fee cases have been analyzed by the courts which have considered them as analogous to the compelled agency fee cases. Thus, *amici* believe they are in a position to bring to the Court's attention information bearing upon the resolution of this matter, which will not be presented by the other participants.

SUMMARY OF THE ARGUMENT

A union may not compel the payment of that portion of an agency shop fee to be devoted to ideological purposes, regardless of any refund procedure it may have effected, from non-union employees who object. Moreover, any collective bargaining activities, supported by a mandatorily extracted fee, must be directly linked to the contributing employee.

The freedom to support ideological causes and the freedom to associate are guaranteed by the First Amendment to the United States Constitution. These freedoms are fundamental and may only be infringed if confronted by a paramount government interest.

Any mandatory agency shop fee which is to be devoted, in part, to other than permissible collective bargaining activities must be separated. Thereafter, both

portions of this fee must be independently justified *prior* to extraction.

Amici are unaware of any paramount government interest which would justify the First Amendment infringement inherent in the mandatory exaction of the ideological portion of the agency shop fee at issue. Moreover, the ability to compel payment of a portion of the fee does not authorize the extraction of the whole.

Similarly, the presence of a refund procedure will not cure the underlying constitutional infringement. It merely perpetuates a system of continuous constitutional violations. At best, a refund will only remedy past wrongs. This is true even if the refund procedure is coupled with the ability to extract a portion of the fee.

Finally, the definition of the scope of permissible activities which properly relate to collective bargaining, and are thus subject to mandatory contributions, must include the requirement that there be a sufficient nexus to the contributing employee. In this way, the union will remain free to finance its legitimate collective bargaining activities, while leaving the affected employee free to support and associate, or refrain from support or association, as he or she desires.

ARGUMENT

This case essentially presents two issues. First, may a union, acting pursuant to an agency shop agreement, collect that portion of a mandatorily extracted agency shop fee to be expended for political or ideological purposes, whether or not a refund mechanism is available to dissenters. Second, what activities are to be defined as constitutionally linked to collective bargaining purposes as established in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The proper resolution of these issues requires an affirmation of the *Abood* holding that monies extracted pursuant to an agency shop agreement may only be spent on collective bargaining activities. Therefore, monies that cannot be spent, cannot be collected. Furthermore, it requires a clarification that the First Amendment to the United States Constitution permits the mandatory extraction of fees and their expenditure for only those collective bargaining activities which are directly related to the individual employee.

I.

Extraction of Ideological Fees is Unconstitutional

A. *The Constitutional Principle*

Proper analysis begins with the Constitution itself. It is the law of the land that:

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what should be orthodox in politics, nationalism, religion, or other matters of opinion. . . .

West Virginia Board of Education v. Barnett, 319 U.S. 624, 642 (1943), cited with approval in *Abood*, 431 U.S. at 235.

The fact that this case involves the right not to associate and be subjected to compelled payment, rather than the right to be free to associate as one chooses creates no constitutional distinction. *Abood*, 431 U.S. at 234.

The pristine right to associate or not is constitutionally fundamental. Beginning in 1956, a line of four cases defined a narrow statutory intrusion on First Amendment rights in the union arena. This limited intrusion was justified by a finding of a compelling national interest in industrial peace. *Abood*, 431 U.S. at 224.

Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956) and its progeny — *Street*, *Allen*, and *Abood*[1] — did not erode or invite incursion upon the constitutional principle of freedom from compelled expression or association. Each reinforced the fundamental nature of this principle. This Court has repeatedly focused on the constitutional necessity of safeguarding the First Amendment freedoms of each citizen. "Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation." *Street*, 367 U.S. at 776, (Douglas, J., concurring).

Throughout the past quarter century, this Court has not assailed that principle. The principle has, however, been assailed elsewhere. While this Court has spoken with clarity on the need for the protection of substantive First Amendment rights, it has, of necessity borne of these cases, left open the dictation of appropriate remedies. The Court's development of remedial guidelines, culminating in the clear suggestion of *Street*, 367 U.S. at 773, adopted in *Abood*, 431 U.S. at 240-241, has pointed to remedies which must protect against mandatory intrusion on constitutional rights. Nevertheless, others, including courts, have relied on these guidelines to encroach upon constitutional rights and to justify their violation.

Amici are informed that there exist today over thirty cases involving mandatory union fees, portions of which are used over citizen objection. [See Appendix C accompanying the *Petition for a Writ of Certiorari* in the instant case.] They are involved in two cases involving mandatory extraction by state universities of mandatory student fees paid over to, and used by, two organizations

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1. *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

amici allege to be ideological. One of these has developed a substantial record, *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982). In the district court, summary judgment was granted to the university in the face of allegations that the entire fee was ideological. Amici had sought an injunction against the collection and payment of these fees. Apparently confusing this Court's holdings reinforcing constitutional principles with this Court's remedial guidelines, the district court reasoned that no constitutional violation had occurred because a refund mechanism existed. *Galda v. Bloustein*, 516 F.Supp. 1142, 1148 (D.N.J. 1981). On appeal, the United States Court of Appeals for the Third Circuit reversed, holding that if the entire fee were ideological, a refund could not cure the resulting constitutional infirmity.

The Third Circuit expressly refused to rule on the effect of a refund in a case such as that presented in *Abood* where a refund might, in that court's view, provide the only available administrative remedy. The Third Circuit's decision apparently presents at least one legal and one practical difficulty. Legally, the administrative difficulties of a constitutional violator are simply not in the same orbit as the fundamental constitutional right violated. Practically, the elevation of administrative problems creates an infinite number of potential encroachments by the violator. The popular presumption may be that ideology is an infinitely small portion of an otherwise justified fee. In reality, however, ideology might take on increasing percentages of the total, albeit less than all. Thus, one dollar of a justified fee could be used to secure an unlimited amount of otherwise illegitimate fees. Whatever the quantitative invasion:

> the individual should not be forced to surrender *any* matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; *nothing* that the group does should de-

> prive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in *minor or major* ways; and he should not be required to finance the promotion of causes with which he disagrees.

Street, 367 U.S. at 776, (Douglas, J., concurring). (Emphasis added). This Court should not deviate from this principle, whether as a matter of substantive constitutional law or of remedy.

B. *This Fee Cannot Be Extracted*

The *Abood* Court clearly stated that a union may not spend involuntary contributions for political or ideological purposes. 431 U.S. 209. It did, however, permit a union, pursuant to an agency shop agreement, to exact a contribution from all employees for its collective bargaining efforts. *Abood* carefully delineated collective bargaining activities and narrowly justified the extraction of only those fees. Non-collective bargaining fees and their activities were carefully separated. Thus, the single "agency shop fee" was judicially split into two separate and distinct fees. Accordingly, the mandatory extraction of both fees must be independently justified *prior* to collection.

The *Abood* Court acknowledged that any extraction involved First Amendment violations, but held that the congressionally determined goal of peaceful labor relations justified compelling payment of that portion of the service charge which was used "for the purposes of collective bargaining, contract administration, and grievance adjustment. . . ." *Abood*, 431 U.S. at 225-226. Significantly, however, the *Abood* Court did not extend this justification to the entire fee; political and ideological contributions could not be compelled.

Once it has been established that a portion of the agency shop fee is not justified by collective bargaining

activities, two competing interests emerge. There is the interest of the non-union employee who may object to any payment. As non-collective bargaining fees cannot be compelled, the non-union employee's interest is best described as a *narrowly* impinged constitutional right to the guarantees of the First Amendment.

Balanced against this right is the interest of the union which has been certified as the collective bargaining representative. The *Abood* decision established the right of the union, pursuant to constitutionally justified legislation, to exact payment for its collective bargaining activities from all employees, whether or not members. As such, the union's interest is properly defined as a statutory right to contribution for services provided.

These two interests clash when this Court is asked if the advance extraction of an entire fee from all employees, a portion of which is known to fund non-collective bargaining expenditures, can be maintained by the union.

It is the union's contention that because it is allowed to collect a part of this fee for collective bargaining purposes, and because it will refund that part expended for non-collective bargaining purposes to those who request it, it is permitted under the constitution to collect initially both portions of the fee. This confuses a clear distinction.

The union cannot be allowed to abuse its ability to collect fees for collective bargaining purposes to justify its extraction of monies for ideological purposes. *Amici* are aware of no paramount government interest which would permit the compelled collection of non-collective bargaining fees. *Elrod v. Burns*, 427 U.S. 347 (1976); *Abood*, 431 U.S. 209.

Moreover, the logical extension of such a claim would permit a minute, justified collection devoted exclusively to collective bargaining expenditures, to justify the collection of an unlimited amount of illegitimate

fees. See discussion *supra* at 7-8. This Court's adoption of such a justification would extinguish the individual's First Amendment protections afforded by *Abood*.

Similarly, the suggestion that a refund of illegally extracted payments will cure the underlying constitutional deficiency must be rejected. While tempting in its simplicity, it ignores a principle of equal simplicity in that it fails to provide the initial constitutional protection — the right to remain free from even a temporary deprivation. *Abood*, 431 U.S. at 244 (Stevens, J., concurring). Allowing a remedy to sanction an unjustified extraction is no different than permitting remorse to validate illegality.

Since the ideological fee is neither justified nor cured, any refund procedure is nothing more than a perpetual system of violations and possible repayments, paid in again, establishing new violations. Thus, the triggering constitutional infirmity is never removed.

Finally, any attempt to couple refundability, a judicially recognized remedy for past illegal payments *Allen*, 373 U.S. at 122, with an accompanying justification for certain exactions, *Abood*, 431 U.S. 209, and assert unitary legitimacy must also fail. This merely confuses remedy with substance, but does not go to the underlying question of the invalidity of the initial ideological extraction. There is no constitutional justification for the First Amendment infringement occasioned by the mandatory extraction of the ideological fee, nor does the subsequent refund serve to cure its deficiency.

This analysis creates no confrontation between constitutional rights and statutory interests. Nor is there any competition between objectors' rights and the constitutional rights of any other entity. Administrative convenience cannot prevail over constitutional rights.

To require the union to use only voluntary contributions for non-collective bargaining purposes will not impeded its ability to generate such funds. It will remain free to engage in all collective bargaining activities. It

will remain free to solicit and expend voluntary contributions for political and ideological purposes. It will remain free to engage in the ideological activities of its members' choice. Its only limitation will be on the ability to extract and retain, even temporarily, funds for non-collective bargaining activities over the objections of those who dissent.

Simultaneously, the First Amendment infringement on the freedom of all employees with respect to the portion of the fee to be devoted to collective bargaining activities is not extended beyond that previously upheld by this Court. *Abood*, 431 U.S. 209. Thus, the dissenting employee, although required to contribute his or her fair share of the costs of collective bargaining, will be protected from involuntarily subsidizing, even temporarily, the ideological positions adopted by the union.

The remedial rule adopted by this Court must protect the constitutional freedom of the objector. No deprivation of his funds, large or small, for whatever time, can be allowed.

II.

Collective Bargaining Activities Must Have a Sufficient Nexus to the Fee Payor

This Court is also confronted with the necessity of defining the scope of permissible activities which properly relate to collective bargaining. The union will seek an expansive reading of the term, asking this Court to adopt the United States Court of Appeals for the Ninth Circuit's view that expenditures which "promote, support or maintain the union" are constitutionally legitimate. *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982).

It is respectfully submitted that this definition is overly broad and would result in the unconstitutional expansion of the existent infringement on dissenting em-

ployees' First Amendment rights. Indeed, it could compel the involuntary financial support of any union activity. *Amici* assert that to be constitutionally valid, the chosen definition must ensure that the activities funded from compelled collections be directly connected to all of those employees from whom the funds are taken.

It is essential that there be a sufficient nexus between the collective bargaining process and the compelled collection in order to justify an ideological extraction. Mere convenience, or even principles of efficiency, will not provide the requisite link. Because constitutional freedoms are infringed to achieve ends only legislatively determined to be in the general welfare, the means utilized must be minimally intrusive upon the individual's rights. See generally, *Elrod v. Burns*, 427 U.S. 347 (1976).

Accordingly, the Court's initial focus should be on the goal sought to be achieved: efficient labor contract negotiation and administration. The next inquiry is the means to be employed, which must be the least intrusive to achieve this goal. Requiring that only fees directly linked to the collective bargaining process can be mandatorily extracted does achieve the end sought by Congress with minimal incursion on individual rights. Moreover, financial support to maintain the vitality of the collective bargaining process is ensured.

Sanctioning broad incursions into individual freedoms guaranteed by the United States Constitution transforms the union into a "free rider" in the political and ideological arena, ultimately maintained at the expense of the dissenting agency fee payor. It would indeed be anomalous if the justification for compelling the service fee, the prevention of "free riders," could be used to place the union in the position of one. *Street*, 367 U.S. at 761.

Should the definition of efficient contract negotiation and administration be found to encompass all or-

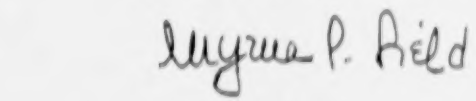
ganizing activities which "strengthen the union's position at the collective bargaining table," *Ellis*, 685 F.2d at 1074 (9th Cir. 1982), the means will have overcome the goal. Moreover, it would require this Court to ignore the legion of cases balancing competing rights, which have been traditionally resolved by sanctioning individual infringement only to the extent necessary to achieve the goal. See generally, *Elrod v. Burns*, 427 U.S. 374 (1976).

Therefore, the dilemma facing this Court should be resolved by limiting the expenditure of compelled contributions to those activities which are directly related to the collective bargaining agreement covering the individual employee. The test must be whether or not the expenditure is for an activity of direct benefit to the contributing employee. For example, an expenditure relating to the provision of the employee's individual health plan under the collective bargaining agreement could be so financed. Conversely, an expenditure relating to the promotion of a national health insurance program could not. Under such a formula, the union will continue to extract funds for the purpose of providing "collective bargaining, contract administration, and grievance adjustment services." *Abood*, 431 U.S. at 225-226. Simultaneously, the employee remains free of the compulsion to finance any ideology.

CONCLUSION

For the reasons stated above, the judgment of the court below should be reversed and the matter remanded.

Respectfully submitted,



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No. 82-1150

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

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v.
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Respondents.

ALLEN L. FAILS, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief, *amicus curiae*, is filed by the National Education Association (NEA) with the consent of the parties, pursuant to the Rules of this Court.

INTEREST OF *AMICUS CURIAE*

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast

majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States.

One of the principal objectives of NEA and its affiliates is to secure improvements in the terms and conditions of employment of educational employees. Toward this end, they engage in collective bargaining pursuant to state public employee collective bargaining statutes or, in the absence of express statutory authorization, pursuant to judicially sanctioned *ad hoc* arrangements agreed to between a particular affiliate and school board.[1] Where permitted by state law, NEA affiliates seek to include in their collective bargaining agreements agency shop provisions (*i.e.*, provisions which require employees in the bargaining unit who choose not to join the exclusive representative to pay a fee to it). Because this Court is being asked to decide in the instant case under what circumstances a provision of this type is permissible under the United States Constitution, NEA has a substantial interest in the outcome.[2]

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[1] The employees of public school districts, colleges and universities are not covered by federal labor relations laws such as the Railway Labor Act or the National Labor Relations Act.

[2] The provision involved in the instant case establishes a "union shop," pursuant to which all employees in the bargaining unit are required to become members of the exclusive representative as a condition of continued employment. This precise type of arrangement is virtually non-existent in the public sector; the preferred alternative is the "agency shop," pursuant to which non-members must pay a fee to the exclusive representative without having to become members. From an analytical point of view, the difference is not significant because even in the private sector " '[m]embership' as a condition of employment is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Thus, any constitutional principles the Court may enunciate will apply to both types of arrangement.

SUMMARY OF ARGUMENT

1. The Court's decisions establish that the First Amendment permits an exclusive representative to expend compelled contributions, over objection, for activities that are "related to" collective bargaining, but that the expenditure of such fees at least for political and ideological activities that are not so related abridges the First Amendment rights of objecting employees. In defining the activities for which objecting employees may and may not be compelled to contribute, and in fashioning procedures to protect the rights of those employees, this Court has been sensitive to the "difficulties in judicially administered relief" and to the competing rights of the majority employees. The lower courts, however, have lost sight both of these concerns and the constitutional interests at stake. Agency shop litigation consequently has been unduly burdensome, and has resulted in the imposition of oppressive remedies that intrude unnecessarily on legitimate union activities and on the constitutional rights of the majority employees. (Part I, pp. 4-10, *infra.*)

2. This Court's decisions actually teach that under the First Amendment, objecting employees may not be compelled to contribute only to the cost of political and ideological activities of an exclusive representative that are unrelated to collective bargaining. Given this limited right, the appropriate judicial role simply should be to determine the extent to which an exclusive representative has incurred discrete expenditures for "unrelated" political and ideological activities, and the representative's only accounting obligation should be to separately identify such expenditures. (Part II(A), pp. 10-13, *infra.*)

Assuming, *arguendo*, that objecting employees have a constitutional right not to contribute to *any* activities of an exclusive representative that are "unrelated" to collective bargaining (regardless of whether these activities are political/ideological), the Court's decisions at least establish that activities are not "unrelated to" collective bargaining simply because they involve something other

than the negotiation or administration of a collective bargaining agreement. Employees constitutionally may be required to contribute to the cost of *any* activity undertaken by an exclusive representative in an effort to bring about improved working conditions. Although such improvements often are secured through collective bargaining and contract administration, an exclusive representative, particularly in the public sector, may engage in other activities in order to achieve them. The Constitution does not require that objecting employees be exempted from contributing to the cost of these latter activities. (Part II(B), pp. 14-21, *infra.*)

3. The constitutional rights of objecting employees—including the right not to have their fees "used, even temporarily, to finance [non-chargeable] activities," *Abood v. Detroit Board of Education*, 431 U.S. 209, 244 (1977) (Stevens, J., concurring), can be fully protected by a relatively simple, union-administered procedure pursuant to which an appropriate portion of the fees in question is placed in escrow. (Part III, pp. 22-30 *infra.*)

ARGUMENT

I. THE JUDICIAL INTEREST IN AVOIDING BURDENSOME LITIGATION AND OPPRESSIVE REMEDIES IN THE AGENCY SHOP AREA

This Court's decisions establish that both the Railway Labor Act ("RLA") and the First Amendment permit an exclusive representative to expend compelled contributions, over objection, for activities that are "related to" collective bargaining, but that the expenditure of such fees at least for political and ideological activities that are not so related violates the RLA and abridges the First Amendment rights of objecting feepayers.[3] In light

[3] *See Railway Employees Dept. v. Hanson*, 351 U.S. 225, 235 (1956); *International Assn. of Machinists v. Street*, 367 U.S. 740, 768 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209, 232-37 (1977). In *Hanson* and *Street*, the Court construed the RLA

of this distinction, there are two issues that must be resolved when an employee objects to an exclusive representative's expenditure of his or her fees. First, it must be determined to what extent, if any, the exclusive representative is making expenditures for "unrelated" political and ideological activities; second, a procedure must be fashioned that will protect the objecting employee's right to refrain from financing such activities and the exclusive representative's right to expend both the objecting employee's fees for activities that are related to collective bargaining and the money of non-objecting employees for *all* activities, including "unrelated" political and ideological activities.

In this context, the Court has been sensitive to the "difficulties in judicially administered relief," *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 122 (1963), that may result from the attempt to identify expenditures not chargeable to an objecting employee. Accordingly, the *standard* the Court has formulated for separating chargeable from non-chargeable expenditures is one that, on its face, is capable of easy application: unless an activity is undertaken "for political and ideological purposes unrelated to collective bargaining," *Abood*, *supra*, 431 U.S. at 232, it may be financed with compelled contributions. *See also* pp. 10-12, *infra*.

Similarly, the Court has cautioned against overbroad procedures that "encroach[] on the legitimate activities or necessary functions of the unions," *Street*, *supra*, 367 U.S. at 774, or that invade the majority's First Amendment "interest in stating its views without being silenced by the dissenters," *id.* at 773. Thus, the *remedies* the Court has approved to protect objectors' rights have been carefully tailored "lest the important functions of labor

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in light of constitutional concerns to establish this distinction between chargeable and non-chargeable expenditures; the Court in *Abood* established the same distinction for constitutional purposes.

organizations . . . be unduly impaired," *Allen, supra*, 373 U.S. at 120. In particular, the Court has held that:

> no decree would be proper which *appeared likely to infringe* the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' . . . exactions in support of political activities.

Id. at 122 (emphasis added).[4]

Nor was the Court unmindful in *Street* and *Allen* of the interests of objecting feepayers; it recognized that resort to lengthy factfinding proceedings under judicial supervision also would disserve the interests of these individuals, who seek an expeditious resolution of their claims.

Expressing the hope that "prolonged and expensive litigation might . . . be averted," *id.* at 123, the Court has encouraged the adoption of "a simple procedure for allowing dissenters to be excused" from the compelled support of unrelated political activities. Specifically, the Court has suggested that "it would be highly desirable for unions to adopt 'a voluntary plan by which dissenters would be afforded an internal union remedy.'" *Abood, supra*, 431 U.S. at 240, *quoting Allen, supra*, 373 U.S. at 122.

Notwithstanding the Court's evident desire to avoid burdensome litigation and oppressive remedies, precisely the opposite has occurred in practice. The case at bar is illustrative. Following nearly five years of discovery, a federal district court conducted eight days of hearings to determine which expenditures of the exclusive representative were properly chargeable to the plaintiffs. (J.A. 4). The court heard the testimony of 16 witnesses from

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[4] In this regard the Court has rejected as improper any attempt to enjoin the application of a union security clause to non-objectors; even objecting employees' claim to relief is limited to that portion of their fee which is used for unrelated political activities. *See Street, supra*, 367 U.S. at 771-774; *Allen, supra*, 373 U.S. at 119-120.

both sides, and over 1,400 documents were introduced into evidence. The exclusive representative was ordered to pay to the 196 plaintiffs sums ranking from $47 to $352 (JA 370-395); the total amount of the judgment is dwarfed by the cost of this litigation to the exclusive representative and its members, the plaintiffs and the judicial system.

The instant case is not unique. In *Beck v. Communications Workers of America*, No. M-76-839 (D. Md., filed June 4, 1976), an action brought by 20 objecting fee-payers, a Special Master appointed by the district court found—after hearing 27 days of testimony and receiving more than 2,000 exhibits—that under its accounting system the exclusive representative had proved that only 19% of its expenditures were related to collective bargaining; objectors were thus held entitled to a rebate of 81% of their dues and prospectively are required to pay to the exclusive representative a fee equal to only 19% of dues.[8] In an effort to establish a higher proportion of related expenditures in the future, the exclusive representative has implemented a complex cost-accounting system under which officers and staff maintain detailed hourly time sheets keyed to 29 different categories of activity, overhead costs are individually pro-rated as chargeable or non-chargeable, and all time sheets as well as thousands of individual expense vouchers are analyzed by outside accountants and statisticians; this system serves no purpose other than to identify with precision the expenditures to which the 20 plaintiffs and other objectors may be required to contribute.

Nor has this happened only in the private sector; it likewise has been the experience in public sector labor relations. Thus, in *Knight v. Minnesota Community College Faculty Association*, Civ. No. 4-74-659 (D. Minn., Dec. 19, 1974), *aff'd*, 51 U.S.L.W. 3700 (March 29,

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[8] Report of Special Master, filed August 18, 1980, pp. 5, 40.

1983), 20 objecting feepayers brought suit seeking, *inter alia*, to prevent the exclusive representative from expending their fees impermissibly under the Minnesota agency shop statute. In the course of a discovery process which lasted for nearly three years, plaintiffs consumed 46 days in deposing 29 staff members of the defendant unions, and the unions were required to make available some 75,000 pages of documents.[6]

Finally, in *Antonacci v. New Jersey*, No. 82-1119 (D.N.J., April 13, 1982), appeal filed Nos. 82-5698 and 83-5533 (3rd Cir.), a suit brought by 10 objecting public school teachers, the district court has expressed its inclination to accord individual objectors the same status as consumers at a public utility ratemaking proceeding; *i.e.*, before collecting any fee from objecting employees, the exclusive representative would have to prove its chargeable expenditures before a state agency, and would have to pay "rate counsel" to represent "consumers" who wish to challenge its calculations.[7]

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[6] *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reopen Discovery, January 30, 1979, pp. 4-12. The percentage of non-chargeable expenditures was never adjudicated; plaintiffs withdrew their claims on this count before trial, and it was dismissed by the court. *See* Plaintiffs' Memorandum in Support of Motion for Leave to File Second Amended Complaint, February 1, 1980, p. 16 n.41; Stipulation Dismissing the Second Claim from Plaintiffs' Amended Complaint, May 30, 1980.

[7] Transcript of Hearing, October 18, 1982, p. 7; Transcript of Hearing, May 3, 1983, pp. 31-32, 54-56. Although discovery in *Antonacci* has not even started, there already are approximately 200 entries in the *Antonacci* docket, and considerable court time has been consumed by hearings and memoranda submitted on legal motions in this case. See, *e.g.*, Hearing on Plaintiffs' Motion for Preliminary Injunction (June 10, 1982); Hearing on Plaintiffs' Motion for Class Certification (Nov. 19, 1982); Hearing on Cross-Motions for Partial Summary Judgment (May 3, 1983); Hearing on Defendants' Motion to Stay Court's Second Preliminary Injunction (July 15, 1983). The district court to date has issued two opinions totaling 100 pages, each of which granted injunctive relief and has given rise to a separate appeal.

The costs to exclusive representatives simply in defending litigation of this magnitude (let alone in implementing the type of accounting system required by *Beck*, or in paying "rate counsel" for objectors as contemplated in *Antonacci*) have been enormous, and have interfered with the majority's constitutional interests as recognized in *Street*. And all this has resulted from an attempt to protect the interests of a relative handful of objecting employees—employees whose own interests are disserved by such massive litigation.[8]

Manifestly, the foregoing is not what this Court intended. What has happened, quite simply, is that the lower courts have lost sight of the precisely delimited constitutional right of objectors that underlies the Court's decisions in *Street*, *Allen* and *Abood*. As we show, the constitutional interests at stake require only that political or ideological activities unrelated to the union's role as exclusive representative must be separately accounted for and objecting employees may not be required to contribute to the costs of those activities. No more record-keeping than this is warranted nor is massive litigation necessary to identify these expendiutres. *See* pp. 10-13, *infra*. Furthermore, the constitutional interests of ob-

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[8] For example, plaintiffs in *Antonacci* work in bargaining units represented by the New Jersey Education Association, whose local affiliates in 1981-82 represented over 80,000 members and 1,700 feepayers; the total number of objecting feepayers was 51, including the 10 plaintiffs in *Antonacci*. Similarly, in *Knight*, the Minnesota Education Association, a co-defendant along with its affiliate, the Minnesota Community College Faculty Association, represented 38,336 members and 2,618 feepayers during the 1981-82 school year; apart from the 20 plaintiffs in *Knight*, there were 43 other objectors in the state. *See also School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982) (Massachusetts Teachers Association represented 60,000 members and 700 feepayers in 1981-82; the total number of objectors was 200, including the two plaintiffs in the *Greenfield* case). In all of these cases, the amount of fees paid by each objecting employee was approximately $150-200 per year, a fraction of which may have been expended on "unrelated" political activities.

jecting employees can be fully protected by a relatively simple, union-administered procedure which escrows an appropriate portion of their agency shop fees. *See* pp. 22-30, *infra*.

II. THE OBLIGATION OF OBJECTING EMPLOYEES TO CONTRIBUTE TO THE COST OF ACTIVITIES OTHER THAN COLLECTIVE BARGAINING AND ADMINISTRATION OF COLLECTIVE BARGAINING AGREEMENTS

A. As previously noted, the Court's decisions at least make clear that all employees may be compelled to contribute to activities that are "related to" collective bargaining (p. 4, *supra*). The related to collective bargaining standard is, like any standard, a short-hand summary of a more complex analysis—an analysis that gives meaning to the words used. The Court first ventured into this area in the seminal case of *Railway Employees Dept. v. Hanson*, *supra*, in which it concluded "that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments." 351 U.S. at 238. More recently, in *Abood v. Detroit Board of Education*, *supra*, the Court elaborated upon this conclusion as follows:

> A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.
>
> • • • •
>
> To be required to help finance the union as a collective-bargaining agent might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by

> the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. *As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.*" [431 U.S. at 222-223 (emphasis added)].

Hanson and *Abood* thus establish that "all who receive the benefits of [an exclusive representative's] work" may be compelled to support that work.[9] Put differently, so long as an exclusive representative is acting to further "the cause which justified bringing the group together" the interest in avoiding "free riders" provides sufficient basis for requiring all employees in the bargaining unit to contribute to the cost of the representative's activities. This is the rationale that underlies the "related to collective bargaining" standard.

Some lower courts have unfortunately viewed this standard as permitting them to second-guess the exclusive representative's decision, made through its democratic processes, to expend funds on a particular activity in order to advance the interests of its constituents. This unduly expansive view of the proper judicial role, which has given rise to the burdensome litigation and oppressive remedies previously described, finds no support in the Court's decisions. The constitutional concern underlying the limitation that the Court has placed on the use of the fees of objecting employees has been precisely defined—that objecting employees not be compelled to contribute

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[9] In explaining the rationale for precluding compelled fees from being used, over objection, for certain activities, *Street* confirms the point. The Court there concluded that Congress had authorized union shops in the belief that "fairness justified the spreading of the costs to all employees who benefited," 367 U.S. at 761; this rationale, in the Court's view, defined the limits of the types of activities for which compelled fees could be expended, over objection, under the RLA.

to the support of activities "for political and ideological purposes unrelated to collective bargaining." *Abood, supra*, 431 U.S. at 232. The Court there explained:

> One of the principles underlying the Court's decision in *Buckley v. Valeo*, 424 U.S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. . . .
>
> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.
>
> • • • •
>
> We do not hold that a union cannot constitutionally spend funds for the *expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.* Rather, the Constitution requires only that *such expenditures* be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment. [431 U.S. at 234-36 (emphasis added)]

As the foregoing quotation indicates, the constitutional right of objectors is simply to refrain from contributing to activities "on behalf of political candidates or toward the advancement of other ideological causes not germane to [a union's] duties as collective-bargaining representative." Two things follow from the limited nature of this right.

First, it is neither constitutionally necessary nor appropriate for a court to go beyond that right and attempt to determine for the members of an exclusive representative which of their *other* expenditures are and are not designed to advance their cause. Once it is determined that an expenditure was not for unrelated political or ideological purposes the constitutional inquiry comes to an end. Lower courts, including the district court in the

instant case, have misread the Court's teaching in this regard.

Second, even where the exclusive representative engages in "unrelated" political or ideological activity, the role of the courts is limited. The objector's right is to refrain from contributing to those expenses incurred by an exclusive representative for unrelated political or ideological activity;[10] protecting that right requires no more than that courts identify the discrete expenditures which directly support those activities. Any other rule necessarily involves the courts in a burdensome exercise in cost-accounting for hundreds if not thousands of separate items and in allocating as between chargeable and non-chargeable expenditures fixed expenses that would be incurred in all events. Although some lower courts have engaged in this exercise,[11] it is plainly not necessary to protect the objectors' rights, and it necessarily leads to the type of burdensome litigation and oppressive remedies that interfere with the rights of the majority.

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[10] In his concurring opinion in *Street*, Justice Douglas, who authored the Court's decision in *Hanson*, illustrated the type of expenditures to which objectors need not contribute:

> If . . . dues are used, or assessments are made, to promote or oppose birth control, to repeal or increase taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money *causes beyond what gave rise to the need for group action.*
>
> I think the same must be said when union dues or assessments are used to elect a Governor, a Congressman, a Senator, or a President.

Street, supra, 367 U.S. at 777 (concurring opinion; emphasis added). *See also Allen, supra*, 373 U.S. at 126, ¶ 3.

[11] *See e.g., Beck v. Communications Workers of America, supra.* Report of Special Master, August 18, 1980, pp. 27-28 (allocating chargeable expenditures for union newspaper based on percentage of column space for eight different categories of news); *id.* at 36 (pro-rating cost of maintenance, repair, and operation of union building).

B. Even assuming, *arguendo*, that the constitutional right is broader, and that it is not improper for a court to determine, *de novo*, the extent to which an exclusive representative's expenditures are related to collective bargaining, at least this much is clear: petitioners are wrong in suggesting that only expenditures for negotiating and administering a collective bargaining agreement can satisfy this standard.[12]

As the Court has made clear, the "cause which justified bringing the group together" is the desire by a majority of the employees in a bargaining unit to improve their working conditions. Although the exclusive representative often secures such improvements through collective bargaining and other direct dealings with the employer, these are not the only means used to promote that "cause." And while certain improvements may be achieved away from the bargaining table, the actions that produced them still are "related to" collective bargaining in the sense intended by this Court, *i.e.*, those ac-

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[12] Petitioners not only fail, as we subsequently demonstrate, to appreciate the type of activities that necessarily must be undertaken by an exclusive representative to adequately represent the interests of bargaining unit employees; petitioners also err in contending that an activity cannot satisfy the "related to" collective bargaining standard unless it is undertaken specifically on behalf of the bargaining unit that includes the objecting employees. As the Ninth Circuit in the instant case recognized, bargaining units represented by local affiliates of a national union are interdependent. Thus, the members of a particular bargaining unit benefit from the overall strength and resources of their national union and its efforts in other bargaining units to improve "industry standards" generally, and not simply from the direct services that the national union provides to the particular affiliate. This point is developed in respondents' brief and need not be expanded upon here. We note only that this interdependence exists equally in private and public sector unionism, and the differences between public and private employment discussed in text, *infra*, have no bearing in this regard.

tions are taken in "furtherance of the common cause . . . which justified bringing the group together." [13]

It is hardly unusual for an exclusive representative to take actions away from the bargaining table in "furtherance of the common cause." The Court has acknowledged that "labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," *Eastex Inc. v. NLRB*, 437 U.S. 556, 565 (1978), and employees may "seek to improve working conditions through resort to" other forums, *id.* at 566. This is true for public as well as private sector employees, and several of the categories of union activities at issue in the instant case are illustrative of activities that are undertaken by exclusive representatives in both sectors, away from the bargaining table, in "furtherance of the common cause . . . which justified bringing the group together." [14]

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[13] Nor is it relevant for present purposes that activity taken away from the bargaining table may be "politically" controversial. The Court in *Abood* made clear that:

> Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to [objectors'] beliefs the critical constitutional inquiry.

431 U.S. at 232. Rather, as explained in text, the critical inquiry is whether the activity in question, be it "political" or otherwise, is undertaken by the exclusive representative "to advance the cause which justified bringing the group together." Only if the relationship between that activity and employees' interest in improving their working conditions becomes so remote that it no longer meets this standard is it unconstitutional to impose the costs of the activity upon objecting employees.

[14] Litigation, for example, provides a classic illustration of a method by which an exclusive representative in either the private or public sector may act away from the bargaining table to improve the working conditions of those it represents.

Other categories of activities at issue here are related to collective bargaining because those activities are part and parcel of the process of creating, maintaining, and governing a cohesive union —a process in which private and public sector exclusive repre-

There are, however, certain basic political and economic differences between private and public employment that make it particularly important for public sector exclusive representatives to take particular types of action "on fronts other than collective bargaining and grievance settlement within the immediate employment context." [15] We discuss three of these differences below.

1. *The Prohibition Against Public Employee Strikes.* There can be no doubt that in the private sector, "economic force [is] 'a prime motive power for agreements in free collective bargaining.' " *Labor Board v. Insurance Agents*, 361 U.S. 477, 489 (1960) (footnote omitted). Labor's "traditional" and "normal" economic weapon in the private sector is, of course, the strike. *Id.*, 361 U.S. at 495. The Ninth Circuit recognized this in the instant case when it observed that "a strike is one of the central methods employed in collective bargaining for improving wages and working conditions." [16] This is not so in the public sector: except in a few states, strikes by public employees are illegal, either by constitutional prohibition, statutory provision or common law.[17]

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sentatives must engage as a foundation for effective collective bargaining. As respondents demonstrate, this is true of conventions, publications, social activities, organizing and death benefits.

[15] Although the case before the Court arises in the private sector, reference to the experience of public sector unions in relevant for two reasons. First, it illustrates graphically the general point that activities by an exclusive representative that take place away from the bargaining table are often "related to" collective bargaining. Second, to the extent the Court enunciates constitutional principles in this case, they will apply in both sectors, and the Court should be fully aware of the realities of public sector collective bargaining when giving content to the "related to" standard.

[16] The Ninth Circuit affirmed the district court's finding in this regard and held that expenditures for strike activities are chargeable to objecting employees (685 F.2d 1065, 1071); petitioners do not here challenge that determination.

[17] The vast majority of states that authorize public sector collective bargaining prohibit strikes by public employees. M. Lieberman, *Public Sector Bargaining*, 26 (1980). *See, e.g.*, Florida Constitution,

Lacking the right to strike, exclusive representatives in the public sector often find it necessary to utilize other means in an effort to generate pressure on the employer to move toward agreement. Inasmuch as "the employer is the public—in ultimate political terms, the voters to whom the public officials are responsible," Summers, *Public Employee Bargaining-A Political Perspective*, 83 Yale L.J. 1156, 1159 (1974), the exclusive representative frequently is forced to "go public," *i.e.*, attempt to develop community support that will, in turn, generate constituent pressure on the employer. A public employer may modify intransigent positions at the bargaining table if the "costs of disagreement" in terms of voter opposition becomes too high. *See* J. Dunlop and N. Chamberlain, *Frontiers of Collective Bargaining*, pp. 150-152 (1967).

In attempting to persuade the community as to the reasonableness of the employees' bargaining-table positions, the exclusive representative utilizes all of the established techniques for taking its case to the public, including radio and television "spots," newspaper advertisements, person-to-person contacts, etc. Because these activities are undertaken in an effort to persuade a public employer to alter its opposition to the exclusive representative's demands, they are the functional equivalent of the strike in the private sector. As such, they are, to paraphrase the Ninth Circuit, "one of the central methods employed in [public sector] collective bargaining for improving wages and working conditions." [18]

Art. I, § 6; Mich. S.A. § 17.455(2); Mass. Stat. c. 150E, § 9A. Even those few states that have authorized strikes in the public sector have done so only for certain employees in limited circumstances. *See, e.g.*, 43 Pa. S.C.A. §§ 1101.1001-.1002 (prohibiting strikes by employees of state courts and guards at prisons or mental hospitals; strikes by other public employees prohibited during pendency of collective bargaining procedures). *General Drivers Local 120 v. City of St. Paul*, 270 N.W.2d 877, 880-881 (Minn. S. Ct. 1978) (public employee strikes authorized under Minnesota law only if employer thwarts Act's binding arbitration procedure).

[18] Although, for the reasons explained in text, public education campaigns are especially important in the public sector, such cam-

2. *The Fiscal Dependence of Public Employers.*—In private sector collective bargaining, the employer generally has the power to make financial commitments and to carry them out. Many public employers, on the other hand, do not have final authority to determine the size of their budgets. The ability to fulfill bargaining table commitments as to salaries and other economic items often will be contingent, either because the employer "must gain the consent of higher levels of political authority," [19] or because the employer "depends on some other source such as state aid for its revenues." [20] In these circumstances, it is incumbent upon the exclusive representative to engage in various forms of lobbying in order to persuade some other agency to appropriate sufficient funds to implement the terms and conditions that have been bargained. Indeed, the Court in *Abood* acknowledged this when it noted the importance to the public sector bargaining process of "related budgetary and appropriation decisions." 431 U.S. at 236.

3. *The Statutory Regulation of Working Conditions of Public Employees.*—As the Court has recognized, employees may "seek to improve working conditions through resort to" other forums, including specifically "appeals to legislators to protect their interests as employees. . . ." *Eastex, supra,* 437 U.S. at 566. Unions in both the public and private sectors have engaged in extensive lobbying in support of, *e.g.*, the Fair Labor Standards Act,[21] the

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paigns also may be a useful tactic for a private sector exclusive representative. Private sector employers often are dependent upon public "good will," and a recalcitrant employer may become more willing to compromise disputed issues at the bargaining table if the public is persuaded that its positions are unreasonable.

[19] J. Dunlop and N. Chamberlain, *supra* p. 127. *See Labor Relations Commission v. Dracut Board of Selectmen*, 374 Mass. 619, 373 N.E.2d 1165, 1170 (1977).

[20] M. Lieberman, *supra* n.17, p. 71.

[21] 29 U.S.C. §§ 201 *et seq.* (1938).

Occupational Safety and Health Act,[22] the Employee Retirement Income Security Act,[23] and other statutes that guarantee benefits or provide protections to the employees whom they represent. Resort to the legislative forum to further the interests of employees is especially important in the public sector, however, because of the extent to which the conditions of public employment are controlled by statute.

Lobbying by a public sector exclusive representative to improve working conditions occurs in at least two distinct contexts. Initially, the exclusive representative may be forced to appeal to the legislature to establish that a particular subpect is bargainable. Although public employees in many states have a statutory right to engage in collective bargaining concerning terms and conditions of employment, "the scope of negotiations in the public sector is more limited than in the private sector." [24] Certain subjects which are of vital importance to employees, and which regularly are dealt with through collective bargaining in the private sector are non-bargainable in the public sector, because they are either regulated by statute or left to the employer's discretion.[25] For example, in many states the courts have held that an exclusive representative may not bargain contractual provisions affecting the loss of jobs through reduction in force or the

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[22] 29 U.S.C. §§ 651 *et seq.* (1970).

[23] 29 U.S.C. §§ 1001 *et seq.* (1974).

[24] *In re IFPTE Local 195 v. State*, 88 N.J. 393, 401, 443 A.2d 187, 191 (1982). *See, e.g., Vermont State Colleges Faculty Federation, Local 3180 v. Vermont State Colleges*, 134 Vt. 451, 418 A.2d 34, 37 (1980).

[25] As Professor Summers explains, "[i]n legal terms the principal question in the private sector is what the *mandatory* subjects of bargaining are, *i.e.*, what decisions the employer *must* share with his employees. The principal question in the public sector is what the *permissible* subjects of bargaining are, *i.e.*, what decisions *may* be made through the specially structured political process." Summers, *supra*, 83 Yale L.J. at 1194 (emphasis in original).

re-employment rights of bargaining unit employees.[26] If the exclusive representative is to achieve contractual protections in regard to such subjects, it first must obtain through legislation the right to bargain over them.[27]

If statutory authorization to bargain over a particular term or condition of employment is not obtained, the exclusive representative may have to lobby to secure improvements in that term or condition through direct legislative action. Thus, for example, in virtually every state, the existence and amount of pension benefits for public employees are fixed by statute, and collective bargaining is preempted.[28] Such subjects are of direct, palpable concern to public sector employees and, therefore, to their exclusive representatives. Given the political realities, however, collective bargaining may not be an attainable objective and lobbying may be the only means by which these representatives effectively can make heard the voices of the employees whom they represent.[29]

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[26] *See, e.g., Parsons-National Education Association v. Unified School District No. 503*, 225 Kansas 581, 593 P.2d 414, 418-420 (1979); *Minneapolis Assn. of Administrators and Consultants v. Minneapolis Special School District No. 1*, 311 N.W.2d 474, 476-477 (Minn. S. Ct. 1981); *Union Co. Bd. of Ed. v. Union Co. Teachers Assn.*, 145 N.J. Super. 435, 368 A.2d 364 (App. Div. 1976).

[27] *See Board of Education v. Associated Teachers*, 30 N.Y.2d 122, 282 N.E.2d 109, 112, 331 N.Y.S.2d 17 (1972) (validity of provision in public sector contract depends upon whether it concerns a proper subject of collective bargaining).

[28] *E.g.*, 71 Pa. S.C.A. § 5955; Iowa C.A. § 20.9. *See generally City of Mason City v. Public Employment Relations Board*, 317 N.W.2d 851, 854-856 (Iowa S. Ct. 1982) (discussing policy reasons for the decision to preempt bargaining). *See also Harper College Faculty Senate v. Board of Trustees*, 51 Ill. App. 3d 443, 366 N.E.2d 999, 1001 (1977) (bargaining on faculty salary levels preempted).

[29] At least one state supreme court has in effect invited public sector unions to resort to lobbying to protect the interests of bargaining unit employees in regard to these preempted subjects:

> If the subject matter is covered by a specific Civil Service regulation and the parties are dissatisfied, their recourse is to seek

In short, the narrow construction that petitioners seek to place on the "related to collective bargaining" standard simply ignores the realities of labor relations. An exclusive representative, in both the private and public sectors, cannot adequately represent the interests of the employees in the bargaining unit solely by what it does at the bargaining table. It must resort to other forums as well; if these latter activities are undertaken "to promote the cause which justified bringing the group together," *Abood*, 431 U.S. at 223, they necessarily are "related to" collective bargaining. To hold otherwise would frustrate the underlying purpose of the agency shop—"to distribute fairly the cost of these activities among those who benefit." *Abood, supra*, 431 U.S. at 222.[30]

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a modification of such regulation through the administrative process. *Indeed, they may even petition the Legislature where a particular term and condition of employment is controlled by a statute with which they disagree.*

State v. State Supervisory Employees' Assn., 78 N.J. 54, 82, 393 A.2d 233, 247 (1978) (emphasis added). *See also Colonial School Board v. Colonial Affiliate NCCEA*, 449 A.2d 243, 248 (Del. Supr. 1982) (restricting subjects of collective bargaining under state statutory scheme; "if this strict construction is deemed incorrect or unjust today, it is a matter for the General Assembly to rectify. . . .").

Lobbying may be necessary not only to secure favorable working conditions, but also to prevent the legislative erosion of previously-bargained protections. In many states, "adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing that previously unregulated matter." *State v. State Supervisory Employees' Assn., supra*, 78 N.J. at 84, 393 A.2d at 248. *See Mutual Aid Assn. v. City of Yonkers*, 60 A.D.2d 856, 401 N.Y.S.2d 98 (1978) (negotiated wage increases nullified by subsequently enacted statute). For this reason, an exclusive representative must guard against the possibility that the legislature will revoke prior commitments made to the employees whom the exclusive representative represents.

[30] As previously noted (pp. 10-11, *supra*), the justification for the agency shop is the governmental interest in promoting labor peace

III. ACCOMMODATING THE INTERESTS OF THE EXCLUSIVE REPRESENTATIVE (AND MAJORITY EMPLOYEES) AND OBJECTING EMPLOYEES THROUGH A UNION ESCROW PROCEDURE

Whatever the proper line may be between chargeable and nonchargeable expenditures, some procedure is required to assure that the exclusive representative is able to charge objectors for the former but does not charge for the latter. Recognizing the difficulties that could be involved in judicial enforcement of this line (*see* pp. 4-10, *supra*), the Court in *Allen* "encourage[d] . . . unions to consider the adoption by their membership of some voluntary plan" for the "vindication of the rights and accommodation of interests here involved." 373 U.S. at 122, 124. The Court reaffirmed this position in *Abood*, noting that "it would be highly desirable for unions to adopt a 'voluntary plan by which dissenters would be afforded an internal union remedy.'" 431 U.S. at 240. Pursuant to this encouragement from the Court, NEA and other unions have adopted such internal procedures.

Petitioners contend that any union procedure is constitutionally inadequate because it necessarily fails to "avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." Pet. Br. at 31, *quoting*

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by eliminating "free riders." *Abood*, *supra*, 431 U.S. at 224, 229. Cost-sharing is not only equitable but also tends to lessen friction between those employees in the bargaining unit who are union members and those who are not, thereby minimizing one source of potential labor unrest. The fact that a particular benefit is obtained through community action, lobbying, etc., does not mean that only union members may take advantage of this benefit. Nor does it mean that only those members should be called upon to defray the costs of the exclusive representative's efforts. Thus, for instance, a failure by some employees in the bargaining unit to share the cost of lobbying to protect or improve pension benefits is just as inequitable—and just as likely to increase tensions within the bargaining unit—as a failure by those employees to contribute to the cost of negotiating a contractual provision for health insurance.

Abood, 431 U.S. at 244 (Stevens, J., concurring). According to petitioners, in order to avoid this risk, the Constitution requires " 'a provision for a hearing before *a state tribunal* on the availability of any representation fee prior to payment of the fee to the union.' " Pet. Br. at 37, *quoting Robinson v. New Jersey*, 113 L.R.R.M. 3272, 3278 (D.N.J. 1983) (emphasis added). Pending such a determination, petitioners state that *all* fees from objecting employees should be placed into an escrow account. Pet. Br. at 36-37. Petitioners recognize that this will deprive the exclusive representative of the use of the portion of the fee to which it legitimately is entitled, but maintain " 'that the statutory right of the [majority] to the permissible amount is outweighted by the potential that the impermissible amount will be used, even temporarily, in violation of the dissenting [employees'] First Amendment rights.' " *Id.* at 37, *quoting School Committee of Greenfield*, *supra*, 431 N.E.2d at 188. As we now demonstrate, petitioners' constitutional analysis is flawed.[31]

Preliminarily, it may be doubted whether petitioners' proposed 100% escrow remedy is even *permissible*, given this Court's holding that an injunction against the collection of any fees from objecting employees is "improper, even though [the injunction] is subject to modification if [the union] come[s] forward and prove[s] the proportion of exacted funds required for purposes related to collective bargaining." *Allen*, *supra*, 373 U.S. at 120. Indeed, part

[31] The particular focus of petitioners' attention is on union procedures pursuant to which the exclusive representative collects the full amount of the agency shop fees, itself makes a determination of the activities "related to" collective bargaining, and on the basis of that determination refunds to objecting employees at the conclusion of the fiscal year what it considers to be the appropriate portion of the fee. It is not at all clear to us that the court below approved this type of procedure, and petitioners' argument is not in any event limited to that particular procedure. For these reasons, we do not discuss here whether such a procedure is constitutionally permissible, but demonstrate only that the type of procedure petitioners champion is *not* constitutionally required.

of the reason that agency shop litigation has been so burdensome, *see* pp. 6-9, *supra*, is because the lower courts have failed to heed the Court's repeated caution against excessive judicial intrusion into "legitimate activities or necessary functions of unions" (p. 5, *supra*). But assuming, *arguendo*, that a requirement for escrowing all dues pending a hearing by a court or state agency is not foreclosed by the Court's prior decisions, there are alternatives that come far closer to satisfying "the objective . . . of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood, supra*, 431 U.S. at 237.

One such alternative is the procedure that has been adopted by NEA, and is utilized by NEA local affiliates that are recognized as the exclusive representatives in several states, including Ohio, Illinois and New Jersey.[32] This procedure operates as follows.

Promptly after the end of each fiscal year, a member of the National Academy of Arbitrators who has experience in public sector labor relations is selected by NEA to serve as the Agency Shop Impartial Umpire. The function of the Umpire is to determine the percentage of NEA's dues income that NEA expended during the just-ended fiscal year for purposes related to collective bargaining.[33] In making this determination, the Umpire is to be guided by the decisions of this Court, as elabo-

[32] The procedure actually is adopted by the local affiliate and used by it to determine the refundable portion of the total agency shop fee paid to it by objecting employees. This fee includes local affiliate payments and also payments to state and national parent organizations. As explained *infra*, the procedure functions in essentially the same fashion at all three levels. For purposes of simplicity in discussion, we refer in text to the "NEA procedure," and focus on its operation at the NEA level.

[33] A similar procedure is followed by the NEA state affiliate to determine the chargeable portion of its expenditures from its dues income for the fiscal year in question. Because analysis by an impartial third party of the actual expenditures of each of the thousands

rated upon by the the lower courts. And, of course, the Umpire has access to all of the financial records of NEA.[34]

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of local affiliates that have bargained agency shop provisions would entail excessive delay, expense and burden, these affiliates are presumed to have expended the same proportion of their dues income on "related" activities as was determined for the state affiliate. Objecting employees are adequately protected by this presumption since local affiliates—with only local responsibilities—invariably spend at least as much, and probably more, of their dues income for activities "related to" collective bargaining than do state affiliates.

[34] The person who has been selected to serve as the NEA Umpire is Arvid Anderson. Mr. Anderson is a nationally recognized labor-management arbitrator who, since 1967, has been Chairman of the New York City Office of Collective Bargaining. Prior to assuming that position, he was a Commissioner and Executive Secretary of the Wisconsin Employment Relations Commission. Mr. Anderson is both an attorney and an economist. NEA's state affiliates have selected individuals of comparable stature to serve as their umpires. For example, the Umpire for the New Jersey Education Association, which is the NEA affiliate in that state, is Eric Schmertz. Mr. Schmertz, who has been a labor-management arbitrator for more than 25 years, is Dean of the Hofstra University School of Law. He has served as a member of both the New York City Office of Collective Bargaining and the New York State Board of Mediation.

Because neutral arbitrators—and especially individuals of such stature—presumptively can be expected to render impartial decisions, *see Schweiker v. McClure*, 456 U.S. 188, 195 (1982), the NEA procedure responds to petitioners' contention that any procedure that allows a union, in the first instance, to determine itself what percentage of its expenditures are for activities related to collective bargaining (and thus to determine what percentage of the objectors' fees may be expended) is constitutionally flawed because the union will be biased in making its decision. *See* Pet. Br. at 34 n.23. To be sure, under the NEA procedure, the union—out of necessity—selects and compensates the arbitrator, but the Court has never suggested that a decisionmaker may be disqualified as impermissibly biased because of the possibility that he might seek to curry favor with one side or the other through his decision; indeed, were this sufficient to establish unconstitutional bias, all adjudicators would have to be granted life tenure. *Cf. Dugan v. Ohio*, 277 U.S. 61 (1928); *Hortonville School District v. Hortonville Education Association*, 426 U.S. 482 (1976).

If an employee who is required to pay an agency shop fee for a particular fiscal year files a written notice with the exclusive representative objecting to the use of his or her fee for activities unrelated to collective bargaining, NEA promptly establishes an interest-bearing escrow account in his or her name.[35] The amount escrowed from each fee payment[36] is equal to the percentage that the Umpire determined to have been expended for "unrelated" activities during the preceding fiscal year, plus a 5% "cushion."[37]

When the fiscal year ends, the impartial review procedure described previously is again followed in order to determine the percentage of NEA's dues income that was expended during the year for purposes related to collective bargaining.[38] The objecting employee then receives a copy of the Umpire's report (explaining how the determination was made) and a check from his or her escrow account in an amount that is equal to the "refundable" portion of the fee paid during the prior fiscal year, plus accrued interest.[39] Any money remaining in the

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[35] The objection notice may be phrased in general terms (*i.e.*, an objection to the expenditure of the fee for impermissible purposes) and need not identify specific expenditures.

[36] The vast bulk of NEA's membership dues and agency shop fees is paid in periodic (*e.g.*, bi-weekly) installments through payroll deduction systems.

[37] Thus, for instance, if the Umpire determined that 11% of NEA's dues income was expended for "unrelated" activities during the 1982-83 fiscal year, 16% of the 1983-84 fee would be escrowed for each objecting employee and only 84% of the fee would be available for use by NEA.

[38] Objecting employees, who previously have been sent an explanation of the procedure, related explanatory materials and copies of the relevant budgets, are free to make written submissions directly to the Umpire.

[39] This check is to be mailed not later than three months after the end of the NEA fiscal year. This modest delay is necessary to enable NEA's independent auditors to complete their analysis and submit an audit to the Umpire. All fees for the next fiscal year

escrow account—which would be attributable to chargeable expenditures—is paid to NEA.[40] If a feepayer wishes to challenge the amount of a refund as inadequate through an available administrative or judicial proceeding, the unrefunded portion of the fee is retained in his or her escrow account (rather than being paid to NEA) until all appeals have been completed.

The practical advantages of the NEA procedure are apparent.[41] By assigning to an experienced arbitrator the task of identifying in the first instance those activities of

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which are collected from an objector before the Umpire's report has issued are placed in escrow pending completion of the report.

[40] If the "refundable" portion for a given fiscal year exceeds the amount in an objecting employee's escrow account, he or she is paid the excess amount, plus accrued interest, from NEA's treasury funds.

[41] By contrast, petitioners' proposal for a "hearing before a state tribunal" would present immense practical problems. Petitioners may be suggesting that each year for each bargaining unit a determination must be made as to the proportion of the exclusive representative's expenditures that will be spent for "unrelated" activities before the representative may use any fees from objecting employees. If this is petitioners' position, the impracticality of the procedure is self-evident. Its implementation will require each state to create a massive bureaucracy and invest substantial resources to hear cases, make the necessary determinations and process appeals from such determinations. It scarcely warrants extended discussion to demonstrate that it would be virtually impossible to do this each year for each of the many bargaining units in the state, and that in practice an adjudication rarely would become final during the fiscal year to which it applied.

Alternatively, petitioners may be suggesting that a determination as to the proportion of the exclusive representative's expenditures that are spent for "unrelated" activities be made "once and for all" for each bargaining unit. Even this task would be a formidable one. Moreover, with the passage of time the relevant proportion may change, and the initial determination necessarily would have to be open to reconsideration at the request of either the objecting employees or the exclusive representative. And once a right to request reconsideration is included in the process, all of the practical problems involved in attempting to make annual determinations would arise.

the exclusive representative that are related to collective bargaining, the procedure provides for an expedited, inexpensive and impartial determination without burdening the courts. If an objecting employee decides to appeal from the Umpire's determination, the reviewing court or agency will have before it a reasoned judgment based on the record of actual expenditures, which at least may be accorded "great weight," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60, n.21 (1974), *quoted in Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 743-44 n.22 (1981).[42] During the fiscal year (when the precise amount of chargeable and non-chargeable expenditures still is somewhat speculative), NEA is not denied the use of all income from objecting employees. And if the proportion of dues income actually expended on activities related to collective bargaining were to exceed the projected proportion (*i.e.*, the proportion expended during the prior fiscal year), the escrow arrangement would make it unnecessary for NEA to engage in a costly and time-consuming effort to recoup from recalcitrant or hostile feepayers the additional amount to which it would be entitled.[43]

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[42] *Cf. United States v. Utah Construction Co.*, 384 U.S. 394, 421-22 (1966) (collateral estoppel applies to factual adjudications made in administrative proceedings). Although the NEA procedure provides that an objecting employee may at any time pursue any available administrative or judicial remedy, a court might elect to refrain from adjudicating a challenge to the portion of the fee being escrowed until after the employee had exhausted his or her remedies under the NEA procedure. *Cf. Clayton v. Automobile Workers*, 451 U.S. 679, 689 (1981).

[43] The Court in *Allen*, while suggesting that "a practical decree" might well include a reduction of future exactions by the proportion on non-chargeable to total exclusive representative expenditures for any objecting employee who "prov[es] his right to relief," also "recognize[d] that practical difficulties may attend to a decree reducing an employee's obligations under the union shop agreement by a fixed proportion, since the proportion of the union budget devoted to political activities may not be constant." 373 U.S. at 122.

At the same time, the NEA procedure fully protects the rights of objecting employees. Because the filing of an objection triggers the prompt escrowing of 5% more than the portion of the objector's fee that presumptively would be expended during that fiscal year for "unrelated" activities (*i.e.*, the portion that *was* so spent during the prior fiscal year), it is highly improbable that any of the objector's monies will be spent for such activities. Thus, the concerns of the First Amendment are fully vindicated.[44]

Admittedly, the escrowing of fees deprives objecting employees of the use of a small amount of money for their own purposes for a limited period of time (although even as to this amount, the objectors receive interest to compensate them for the loss). But petitioners' attempt to transform this into a First Amendment injury by characterizing it as a "deplet[ion of] their own funds and resources [which] render[s] them unable to express their own ideas and support their own causes" (Pet. Br. at 35), should be summarily rejected. On this reasoning, any temporary deprivation of money would raise First Amendment concerns because in every case the money might otherwise be spent for protected First Amendment activities. No decision of the Court provides even the remotest support for such a far-reaching theory.[45]

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[44] If the final refund exceeds the amount escrowed, *see* n.40, *supra*, NEA will to the extent of the difference be subject to the concern expressed by Justice Stevens in *Abood* (p. 22 *supra*). But as the Court noted with regard to a slightly different point in *Allen*, "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required." 373 U.S. at 122.

[45] In *Abood*, the Court implicitly reached the opposite conclusion, when it noted that a feepayer who objects to the exclusive representative's permissible use of his or her money to finance activities related to collective bargaining retains the freedom—presumably using other resources—both to criticize and disavow the representative's position and to express his or her own. 431 U.S. at 230.

Moreover, the Court's decision in *Threlkeld v. Robbinsdale Federation of Teachers*, 51 U.S.L.W. 3251 (1982), *dismissing appeal from* 316 N.W.2d 551 (Minn.), establishes that considerations of

In sum, the Constittuion does not require—and the Court's decisions do not suggest—that an exclusive representative should be denied the use of all fees from objecting employees pending a judicial or state agency determination of the amount to which it is entitled. A procedure such as that adopted by NEA, which "avoid[s] the risk that [dissenting employees'] funds be used, even temporarily, to finance' activities unrelated to collective bargaining," (p. 22 *supra*), provides a far more appropriate reconciliation of the interests of the majority and dissenting members of the bargaining unit.

CONCLUSION

For the above-stated reasons, petitioners' principal arguments are without merit, and the judgment below should be affirmed.

Respectfully submitted,

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due process—including, *inter alia*, the First Amendment interests of objecting employees—do not preclude the escrowing of a small amount of an objecting employee's money for a limited period of time pending a determination of the amount to be refunded.

Finally, it is appropriate to point out that the procedure advocated by petitioners, pursuant to which 100% of objectors' fees are placed in escrow, also would have the effect of depriving objectors temporarily of the use of their money.

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al.

Docketed:
January 7, 1983

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Merrill, Michael E.

Counsel for respondent: Gold, Laurence

Entry	Date	Note	Proceedings and Orders
1	Nov 22 1982		Application for extension of time to file petition and order granting same until January 7, 1983 (Rehnquist, November 23, 1982).
2	Jan 7 1983	G	Petition for writ of certiorari filed.
3	Jan 7 1983		Appendix of petitioner Howard Ellis filed.
5	Jan 28 1983		Order extending time to file response to petition until March 11, 1983.
6	Mar 9 1983		Order further extending time to file response to petition until March 14, 1983.
7	Mar 11 1983	G	Motion of William L. Dickinson for leave to file a brief as amicus curiae filed.
8	Mar 14 1983		Brief of respondent Bhd. of Ry., Airline, et al. in opposition filed.
9	Mar 16 1983		DISTRIBUTED. April 1, 1983
10	Mar 25 1983	X	Supplemental brief of petitioners Howard Ellis, et al. filed.
11	Mar 28 1983	X	Reply brief of petitioners Howard Ellis, et al. filed.
13	Apr 11 1983		REDISTRIBUTED. April 15, 1983
14	Apr 18 1983		Motion of William L. Dickinson for leave to file a brief as amicus curiae GRANTED.
15	Apr 18 1983		Petition GRANTED.
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17	May 3 1983		Order extending time to file response to petition until July 18, 1983.
18	May 27 1983		Brief amicus curiae of Eddie Keller and Wm. Cumero filed.
19	Jun 20 1983		Order further extending time to file response to petition until August 18, 1983.
20	Jul 21 1983		Request of July 18, 1983 for further extension of time to file brief of petitioners on the merits DENIED.
21	Jul 28 1983		Extension of time to file petitioners' brief on the merits and joint appendix filed with WHR (A-54).
22	Jul 29 1983		Order denying same by Rehnquist, J.
23	Aug 18 1983		Brief amicus curiae of The Legal Foundation of America filed.
24	Aug 18 1983		Brief amicus curiae of Mid-Atlantic Legal Foundation, et al. filed.
25	Aug 18 1983	G	Motion of State Bar of California for leave to file a brief as amicus curiae filed.

Entry	Date	Note	Proceedings and Orders
26	Aug 18 1983		Brief of petitioners Howard Ellis, et al. filed.
27	Aug 18 1983		Joint appendix filed.
28	Aug 31 1983		Record filed.
29	Aug 31 1983		Certified original record & proceedings, 15 vols., received.
31	Sep 12 1983		Order extending time to file response to petitior until October 27, 1983.
32	Oct 3 1983		Motion of State Bar of California for leave to file a brief as amicus curiae GRANTED.
33	Oct 21 1983		Order further extending time to file response to petition until October 31, 1983.
34	Oct 31 1983		Brief amicus curiae of Natl. Education Assn. filed.
35	Oct 31 1983		Brief amicus curiae of AFL-CIO filed.
36	Oct 31 1983		Brief of respondents Bhd. of Ry., Airline, et al. filed.
37	Nov 15 1983		CIRCULATED.
38	Nov 23 1983		SET FOR ARGUMENT. Monday, January 9, 1984. (3rd case)
39	Dec 30 1983	X	Reply brief of petitioners Howard Ellis, et al. filed.
40	Jan 9 1984		ARGUED.